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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

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[fol. 1] [Caption omitted]

[fol. 2]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action. File No. 90 (Superior)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

Excerpts From Proceedings

had on the hearing of the above-entitled cause, in said Court, sitting in the City of Wausau, in said Western District and State of Wisconsin, the Honorable Patrick T. Stone, Judge, presiding; said cause having come on for hearing on Friday, the 25th day of October, 1945, at 9:30 o'clock in the forenoon.

APPEARANCES:

Messrs. Johnson, Fritschler & Barstow, by Mr. Barney Barstow; Mr. M. L. Countryman, Jr., and Mr. L. B. daPonte, on behalf of the plaintiff.

Mr. Charles H. Cashin, United States Attorney; Mr. Hubert H. Margolies, Attorney, Department of Justice, on behalf of the defendant.

MOTION TO WITHDRAW CERTAIN DEFENSES

Mr. Margolies: Mr. Cashin and I have reviewed the defenses to the various claims set forth in the complaint, and we have concluded that the claim set forth in paragraph 4 of the complaint, relating to shipments of coal from Kleenburn, Wyoming, to Fort Missoula, Montana, were for the purpose of heating the Fort while Italian seamen were being detained, rather than interned, in July of 1941; and, because, in our view, detention in time of peace is not the equivalent of internment, we are withdrawing the Govern-
[fol. 3] ment's defense to the claim set forth in paragraph 4. So that that is now out of the case.

The Court: And wisely so. I think your judgment is good on that. It may be withdrawn.

Mr. Margolies: Well, we felt that in all candor we should.

The Court: Yes, I think so.

EXCERPTS FROM THE ARGUMENT OF MR. daPONTE ON BEHALF OF THE PLAINTIFF

Mr. daPonte: Now, the next item is plumbing fixtures. The plaintiff has withdrawn that item, because I supposed when we selected it that the plumbing fixtures were also for the use of the contractor's men, but it seems that——

The Court: Do you mean out there at the internment camp?

Mr. daPonte: No, out there at Dutch Harbor, Alaska, the same place these bowling alleys were shipped. I thought they were also for the contractor, but it seemed they were to be installed in naval barracks.

The Court: Well, from my reading of the briefs, the shipment of that coal out to the internment camp is necessarily under a different category from the toilets used by these men.

Mr. daPonte: Oh, yes, they are; but as we say in the brief, it presents probably a borderline question as to whether these fixtures were construction materials or whether they were articles to be ready for use.

The Court: They were shipped after war had been declared.

Mr. daPonte: Well, let's see—I don't recall, but I don't think that would make any difference. It would be military property if for the use of military personnel in time of peace the same as in time of war; it wouldn't make any difference.

So I didn't want to split any hairs with the Government on that. If you treat them as construction materials, you have got one question; if you treat them like a kitchen stove or range for use of the armed forces, you have got another question. So we just gave them the benefit of being like articles of any other equipment or supplies that belong to the armed forces, because we don't need that particular shipment, anyway, because we have other shipments that present all the questions we are concerned with.

[fol. 4] EXCERPTS FROM THE ARGUMENT OF MR. MARGOLIES ON BEHALF OF THE DEFENDANT

Mr. Margolies: Now, because of the importance of this cost-plus shipment, if there is any question being raised as to the passage of title to the United States—a point that was not raised until we were served with the reply brief on behalf of plaintiff—I would like the privilege of filing a brief devoted exclusively to the passage of title to the United States—that is, if plaintiff in his rebuttal argument indicates that he is seriously questioning that title to the lumber that was shipped to the Twin Cities Ordnance Plant was in the United States.

* * * * * * *

Mr. Margolies: Now, coming back to the question of whether the United States had title to the lumber that was shipped to the Twin Cities Ordnance Plant, Colonel Lasker, who represents the War Department before the various committees of Congress, described in a very lucid fashion the practice of the War Department with reference to title and land grant rates. He said:

> "There has been a considerable amount of negotiation of contracts, as you all know; and under the negotiation of contracts or whatever type of contract it might be, we have written into most of them a saving clause to the Government, to the War Department, of the authority to take title to goods used in the manufacture of the particular item at the point of origin, or to furnish to the contractor the raw material, if you will, or the parts that go into its finished product; so that on, we will say, a cost-plus-fixed-fee contract a good deal of the material procured and going into the manufacture of the finished product moves on a commercial bill of lading and does not necessarily take land grant rates. However, the contract is so written that the War Department may take title to the materials at the point of origin and ship them on a Government bill of lading, thereby taking advantage of the land grant rates.
>
> "So, when this property is moving to the contractor's plant, it might move on a Government or it might move on a commercial bill of lading. If it

moves on a commercial bill of lading and arrives at destination, then the contractor and probably a representative of the contracting officer"—

[fol. 5] that is, the War Department man,

"decides whether or not that commercial bill of lading should be converted to a Government bill of lading, and that decision is based on the application or non-application of land grant rates for that particular haul. So we have a saving clause in these contracts, where we can take advantage of the lesser cost of transportation where it is applicable and where it is appreciably less; so, regardless of the kind of contract, whether it be on a bid basis, or whether it be a negotiated contract or a cost-plus-fixed-fee basis, we have provided this so that we may take advantage of the lowest transportation costs available."

The practice of the War Department is set forth in these Army Regulations, of which I have a copy here, and in two sentences we can see what the practice of the War Department is. This is Army Regulations No. 55,150, and on page 14 the following appears:

"Transportation of military or naval property of the United States moving for military or naval use is subject to land grant rates where applicable. Transportation of other property is not."

And then, in italics:

"Land grant rates are not available on property belonging during transit to vendors, contractors, cost-plus contractors, or others, regardless of the form or kind of bill of lading used."

Now, the War Department has an understanding, because of the fact that throughout the history of land grant rates the negotiations with the railroad were always handled through the War Department; and in those instances in which the Government is entitled, when the War Department claims the benefit of land grant rates, it is invariably on property which is owned by the United States. Now, if it will help your Honor, I will leave a copy of this——

The Court: I think not. Is there any reference to that in your stipulation, or not?

Mr. Margolies: There is no reference in the stipulation.

The Court: And does your stipulation provide that the Government is the shipper in all these cases at the point of origin, the origin of the shipment?

[fol. 6] Mr. Margolies: If I may venture to speak for Mr. daPonte, there is only a question as to this one shipment to Twin Cities Ordnance Plant. I don't know whether he is going to insist on that issue. He raised it in his reply brief for the first time, and I don't know whether he is seriously questioning that title wasn't in the United States.

The Court: Let's find out now.

Mr. daPonte: Well, what I said to your Honor was that under that contract there do-n't seem to be any question but what the title was not in the Government until they inspected and accepted the material. We don't think it is important whether it was shipped on Government bill of lading or not. Under this contract it is expressly provided——

The Court: Is that the shipment to Foley Brothers?

Mr. daPonte: Yes, sir. That was all I knew about it. I don't know anything about it——

The Court: What does the Governement contend?

Mr. Margolies: The Government contends that under the contract the Government reserves the privilege of furnishing material when it can get lower rates; and that the Government did get, from these lumber companies in Washington, the lumber which it shipped and which it owned, and it shipped it to Foley Brothers.

The Court: If the Government owned that lumber, then it was the shipper.

Mr. Margolies: The Government did own the lumber. The Government was shipper and consignee.

Mr. daPonte: No, you are in error there. The lumber company was the shipper.

Mr. Margolies: The lumber company was the shipper, but this was——

The Court: Shipped on the order of the Government?

Mr. daPonte: Foley Brothers was the consignee.

Mr. Margolies: Now, this was an f. o. b. point of origin shipment, so the title passed to the purchaser at the time they were loaded; so that, from the moment of loading,

the person having title was the United States, and our view is that the United States was the shipper.

The Court: The Government bought the lumber, and paid for it?

Mr. Margolies: The Government bought the lumber, and paid for it.

Mr. daPonte: Well, of course, that doesn't appear, Mr. Margolies.

[fol. 7] Mr. Margolies: It does appears that the procuring agency was the Government; that the purchases were made on purchase order allocations.

The Court: If you can't stipulate that, you had better get some evidence in.

Mr. daPonte: I don't know anything about it except what these gentlemen wrote in the stipulation in that regard, and I accepted the statement.

Mr. Margolies: This is a joint stipulation.

The Court: I notice the stipulation provides that either party may submit further evidence if they see fit.

Mr. daPonte: Yes, sir.

The Court: There is a saving clause:

> "It is understood that this stipulation shall in no way affect the burden of proof which rests upon one party or the other under established principles of law."

It is also provided that:

> "Either party may offer additional relevant evidence not inconsistent with this stipulation."

Mr. Margolies: Well, if your Honor will look at the top of page 12——

The Court: Of what?

Mr. Margolies: Of the stipulation.

Mr. daPonte: Page 14.

The Court: All right.

Mr. Margolies: (Reading from stipulation):

> "The Purchase Orders for lumber for the construction of Plant No. 2 and Plant No. 2 Expansion were issued against Purchase Allocations issued by the Office, Chief of Engineers, Washington, D. C. As contractors for the project Foley Bros., Inc., and Walbridge, Aldinger issued requisitions for purchase of the amounts

of lumber they estimated would be required. On receipt of such requisitions the Area Engineer advised the Office, Chief of Engineers, as to such requirements. That Office issued allocations therefor, and on receipt of such allocations, the contractor issued Purchase Orders to Vendors."

The Court: That seems to clear that up.

Mr. Margolies: Then:

"Title to all work completed or in the course of construction, and title to all materials, vested in the Government when designated by its Contracting Officer, and the Government reserved the right to furnish any [fol. 8] materials necessary for the completion of the work. The Office, Chief of Engineers, acted as a central procuring agency for lumber used in the construction of the ordnance plant and issued allocations for the purchase of said lumber."

The Court: Well, that wouldn't leave any doubt that the Government was the owner and the shipper of that lumber.

[Reporter's certificate to foregoing paper omitted in printing.]

IN THE DISTRICT COURT OF THE UNITED STATES

MEMORANDUM OPINION—Filed January 16, 1946

This is an action commenced under the Tucker Act (paragraph 20 of Section 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093 as amended, 28 U.S.C.A. 41 (20)) to recover from the defendant freight charges on interstate shipments of government property. Plaintiff submitted its bills to the defendant at published tariff rates. The defendant, claiming that land grant rates applied under Section 321 (a) of the Transportation Act of 1940, 49 U.S.C.A. 65(a), deducted the difference between the published tariff [fol. 9] rates and the land grant rates, in some instances from the original bills and in other instances from subsequent bills.

The facts have been stipulated by the parties, and the Court adopts the stipulation as its findings of fact.[1]

[fol. 10] The defendant denies liability and alleges that the shipments in dispute constituted transportation of military or naval property of the United States moving for military or naval and not for civil use, within the meaning of said Section 321 (a) of the Transportation Act.

[fol. 11] Plaintiff denies that the said shipments were military or naval property of the United States moving for military or naval and not for civil use, and contends that the defendant is not entitled to the land grant deductions it has taken on the shipments involved in this action.

[fol. 12] Plaintiff has withdrawn its claim as set forth in paragraph 12 of the stipulation (paragraph IX of the complaint), and defendant has admitted liability to plaintiff on the shipment described in paragraph 7 of the stipulation [fol. 13] (paragraph IV of the complaint). The total amount now claimed by plaintiff from the defendant in this action is $3,889.08.

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[1] That part of the stipulation pertinent to the determination of the issues herein reads as follows:

"8. During the month of August, 1941, plaintiff, in connection with the New York, New Haven and Hartford Railroad Company, the Erie Railroad Company, and the Chicago and Northwestern Railway Company, transported on Government bill of lading N686622 from Pawtucket, Rhode Island, to Tacoma, Washington, in connection with contract NOs-88648, and plaintiff there delivered to the consignee 15,780 pounds of insulated copper cable shipped by the inspector of naval material, United States Navy, Boston, Massachusetts, consigned to District Material Officer, Thirteenth Naval District, c/o Seattle-Tacoma Shipbuilding Company for Maritime Commission, Hull 123.

"The insulated copper cable was furnished and transported by the Navy Department of the United States for the purpose of being used in the installation of degaussing equipment (to neutralize magnetic mines) on Hull No. 123. Hull No. 123 was a single crew cargo vessel built by the Seattle-Tacoma Shipbuilding Corporation pursuant to a contract entered into on October 9, 1939, between the Seattle-Tacoma Shipbuilding Corporation and the Maritime Commission of America.

[fol. 14] That portion of the statute pertinent to these proceedings reads:

> "Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to (the Act) * * * of any * * * property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

There is only one question for this Court to decide, and that is: Were the shipments of the government property described in the complaint and stipulation military or naval property moving for military or naval use and not for civil use?

The term "military use" will be considered for the present purpose as embracing naval use.

"In accordance with the provisions of subsection (b) of Section 501 of the Merchant Marine Act of 1936, as amended (46 U.S.C. Sec. 1151 (b)) the plans and specifications for the construction of Hull No. 123 were submitted to the Navy Department for suggestions as to changes that should be made, in order that the vessel might be suitable for conversion into a military or naval auxiliary or suitable to the United States in time of war.

"In 1940, while this vessel was under construction, it was determined by the Navy Department and the Maritime Commission that all vessels under construction by the Maritime Commission should have degaussing equipment. Discussions between the Navy Department and the Maritime Commission resulted in the adoption of the following procedure for equipping Maritime Commission vessels under construction:

> Degaussing specifications would be prepared by the Navy Department and transmitted to the Maritime Commission for forwarding to the Commission's ship contractor. Responsibility was placed on the Maritime Commission to make all necessary arrangements with the shipbuilders in accordance with the specifications furnished by the Navy Department. All degaussing

Webster's New International Dictionary, 2nd Edition, unabridged, defines the words "military" and "naval" as follows:

> "Military"—"of or pertaining to soldiers, arms or war; belonging to, engaged in, or appropriate to the affairs of war; according to the methods and customs of war or armies";
>
> "Naval"—"of or pertaining to ships or shipping; of or pertaining to or connected with, possessing or characteristic of vessels of war or a navy".

Black's Law Dictionary, 2nd Edition, at page 778, defines military as "pertaining to war or to the army; concerned with war".

The times, circumstances and conditions must all be considered in determining whether property is used for a military purpose. In times of war, the concept of "property for military use" takes on a wider range than in times of peace. Property which in times of peace or under ordinary conditions is usable for "non-military" purposes, must be

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> equipment was to be furnished by the Navy Department, including additional generating capacity where necessary. The cost of the equipment together with the cost of transportation was to be borne by the Navy Department. During the installation of the equipment the Navy Department would act in an advisory capacity, providing technical information whenever necessary.

"Specifications for the degaussing equipment for Hull No. 123, later known as the S. S. Idaho, were furnished by the United States Navy Department, which acted in an advisory capacity in the installation, and assumed and paid for the cost of the degaussing equipment and all transportation costs.

"Article 9 of the Maritime Commission contract covering the sale of the vessel reads in part as follows:

> 'Until the emergency declared by the President of the United States in a proclamation dated September 8, 1939, shall cease to exist, the vessel shall be operated to and from such port or ports and under such conditions as the Commission shall direct.'" • • •

considered in times of war "military" when it is used for a military purpose. The test is whether the foremost purpose which the shipment is designed and intended to serve is a military purpose, and whether the civilian use is more than incidental.

[fol. 15] Military property includes all property of every kind and description intended for and used in connection with the conduct of the war. Modern science has changed weapons of warfare. Many articles and substances once considered unimportant for a belligerent purpose have become necessary and useful in the prosecution of the war. Military or non-military articles can be properly classified only after appropriate consideration has been given to the pressure and exigencies of the time, the current needs and circumstances of its use. Fishing tackle for use by vacationists is civil property, but manifestly becomes military when packed in a life raft for use by airmen downed at sea. Copper cable, as such, is not necessarily military property. However, under particular conditions of war or defense,

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"9. During the months of January and February, 1942, plaintiff transported over its own line, on commercial bills of lading, from Longview, Whites, Everett, and Shelton, Washington, to New Brighton, Minnesota, and there delivered to the consignee, seven carloads of lumber, shipped by various lumber companies, consigned to the U. S. Area Engineer, Twin Cities Ordnance Plant, in care of Foley Brothers, Inc., and Walbridge, Aldinger Company, . . .

"Twin Cities Ordnance Plant at New Brighton, Minnesota, was constructed for the United States, under authority of the Secretary of War, for the manufacture of .30 and .50 caliber ammunition pursuant to a cost-plus-fixed-fee construction and operation contract, Contract No. W-ord-527, entered into in July, 1941, with the Federal Cartridge Corporation of Minneapolis, Minnesota. The plant was constructed on a site furnished and made available by the Government, which is, and at all times has been, the owner of the plant facility known as Twin Cities Ordnance Plant. Foley Bros. and Walbridge, Aldinger Company, as a Joint Venture, were the authorized and approved subcontractors for the construction services. The plants were to have an average daily capacity based on twenty-four (24) hours of operation per day, of 2,000,000 rounds of caliber .30 ammunition and 600,000 rounds of caliber .50 ammuni-

it may become indispensable to military functioning when owned by the United States and devoted to a war use. It then acquires the character of military property.

The shipment of bowling alley equipment was originally intended to serve as a recreation center for the civilian employees of the contractor and later as a recreation center for military personnel occupying the station. The construction work performed by the contractor and his men was essential to the war effort and was so regarded by the Navy Department. The remoteness of the station in Alaska, the disagreeable weather, difficult working conditions, and the boredom of off-hours necessitated special measures to keep the employees satisfied and willing to remain at the station. The structure which was to house the bowling alley was completed in December, 1942, when all civilian workmen were evacuated and the construction work was taken over by the Seabees. At Dutch Harbor, where the alleys were installed, the lands and buildings are all owned by the United States and operated as a naval establishment, and all non-military activities are excluded. Clearly the alleys fulfilled a military function in maintaining the efficiency,

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tion. By supplemental contract in January, 1942, the plant was expanded to provide a capacity of 5,000,000 rounds of caliber .30 and 1,600,000 rounds of caliber .50.

"Construction of the plant project was under the supervision of the Quartermaster Corps, United States Army, from July 17, 1941, to December 15, 1941. Thereafter, all construction work at the Project was under the supervision of the Corps of Engineers, United States Army. The plant was constructed in three parts, known as Plant 1, Plant 2, and Plant 2 Expansion. The buildings of Plant 1 were constructed largely of steel, brick and concrete and were substantially complete on or about June 30, 1942. Plant No. 2 and Plant No. 2 Expansion were started January 7, 1942, and completed on or about January 15, 1943. They consisted of several large manufacturing buildings with the necessary additional buildings, all of good construction.

"The Purchase Orders for lumber for the construction of Plant No. 2 and Plant 2 Expansion were issued against Purchase Allocations issued by the Office, Chief of Engineers, Washington, D. C. As contractors for the project Foley Bros., Inc., and Walbridge, Aldinger issued requisitions for purchase of the amounts of lumber they estimated

morale and physical fitness of the military men at this remote outpost, and are military or naval property, and were moved in interstate commerce for military and not for civil use.

In May, 1943, plaintiff transported to Minneapolis, Minnesota, consigned to the Depot Quartermaster for the United States Marine Corps, the lumber referred to in paragraph 10 of the stipulation for manufacture into trestle and pon- [fol. 16] ton balks for use of the United States Marine Corps. The lumber used in the manufacture of the trestle and ponton balks was carefully selected, assembled and shipped by the Marine Corps. The trestles and balks manufactured from the lumber are components of pontons or demountable floating bridges required to move military personnel and vehicles of war across water barriers. Some of the trestle and ponton balks so manufactured were shipped and used in military operations overseas, and some were used for training of combat engineers at Camp Lejeune, North Carolina, and at Quantico, Virginia. The lumber used to manufacture these components was unquestionably military property.

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would be required. On receipt of such requisitions the Area Engineer advised the Office, Chief of Engineers, as to such requirements. That Office issued Allocations therefor, and on receipt of such allocations, the contractor issued Purchase Orders to Vendors.

"All of the lumber shipments in question were used in the construction of Plant 2 and Plant 2 Expansion. Title to all work completed or in the course of construction, and title to all materials, vested in the Government when designated by its Contracting Officer, and the Government reserved the right to furnish any materials necessary for the completion of the work. The Office, Chief of Engineers, acted as a central procuring agency for lumber used in the construction of the ordnance plant and issued allocations for the purchase of said lumber. Since January, 1943, the ordnance plant has been engaged in the manufacture of .30 and .50 caliber ammunition for use by the armed forces of the United States in the present emergency." • • •

"10. On or about May 10, 1943, plaintiff transported over its own line of railroad on Government bill of lading No. M-121708-43 from Bucoda, Washington, to Minneapolis,

In August, 1941, when our involvement in the war was imminent, plaintiff transported for the Navy Department to Tacoma, Washington, in interstate commerce, insulated copper cable for use by the Navy in the installation of degaussing equipment on Hull No. 123, a cargo vessel later known as the S. S. Idaho. Hull No. 123 was built pursuant to a contract entered into on October 9, 1939, between the shipbuilding company and the Maritime Commission. In accordance with Section 501 (b) of the Merchant Marine Act of 1936, as amended, 47 U. S. C. A. 1151 (b), the plans for the construction of Hull No. 123 were submitted to the Navy Department for changes necessary for the vessel to be readily converted into a military or naval auxiliary. While this vessel was under construction in 1940 the Maritime Commission and the Navy Department agreed that all vessels under construction by the Maritime Commission, as this one was, should have the defense feature, the degaussing equipment, to counteract magnetic mines. The Navy Department furnished the specifications for this equipment and paid for its installation on Hull No. 123 as a necessary defense measure. This vessel so equipped was essential to and was used in the conduct of the war. The copper cable comes within the category of military or naval property.

Minnesota, and there delivered to the consignee, 113,120 pounds of fir lumber loaded in car No. PLE46525, shipped by Mutual Lumber Company, consigned to Depot Quartermaster, Aaron Carlson care Crown Iron Works, at Minneapolis, Minnesota, for United States Marine Corps.

"The lumber was shipped to be urea salts treated, kiln dried, milled and manufactured into trestle balks and ponton balks, sills, and chess, at the Crown Iron Works at Minneapolis. The balks, sills and chess are necessary members of a certain type of ponton or demountable floating bridge required to move military personnel and vehicles of war across water barriers. The trestle and ponton balks manufactured from the lumber shipped in Car No. PLE46525 are now overseas in connection with military and naval operations or have been used in construction of ponton bridges and temporary piers used at Camp Lejeune, North Carolina, and Quantico, Virginia, for training of combat engineers." • • •

"11. On or about February 13, 1942, plaintiff and its connecting carriers, the Grand Trunk Railroad and the Chicago

In January and February, 1942, the plaintiff transported lumber purchased and shipped by defendant in interstate commerce to New Brighton, Minnesota, consigned to the United States Area Engineer, Twin Cities Ordnance Plant, to be used in the construction of buildings for the Twin Cities Ordnance Plant on land owned by the United States Government. The construction was done under the author- [fol. 17] ity of the Secretary of War, and under the supervision of the Corps of Army Engineers. The plant was to be used to manufacture .30 and .50 caliber ammunition pursuant to a cost-plus-fixed-fee contract. The ordnance plant then in operation was engaged in the manufacture of .30 and .50 caliber ammunition for our armed forces. The lumber was shipped and used for a specific purpose,—to construct a public arsenal which would provide more small arms ammunition for the army. The arsenal produced nothing but ammunition for the defendant.

It is a matter of common knowledge that at the outbreak of the war the productive capacity of the commercial producers of ammunition in the United States was inadequate. The urgent requirements of the army necessitated a rapid

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and Northwestern Railway Company, transported on Government bill of lading No. N-845519 from Muskegon, Michigan, to Seattle, Washington, and plaintiff there delivered to the consignee, 29,037 pounds of bowling alley outfits loaded in Milw. Car No. 6054, shipped by Inspector of Naval Material consigned to the Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy3570. On or about February 26, 1942, the said equipment was received by the Alaska Steamship Company for transportation on the ship Mt. McKinley to Dutch Harbor, Alaska.

"Contract NOy3570 was entered into pursuant to the provisions of the Acts of April 25, 1939 (53 Stat. 590) and May 25, 1939, (53 Stat. 757, 772) authorizing the construction, development and increase of naval aviation bases in various designated areas, including Alaska. The basic contract covered construction of Naval Air Bases at Kodiak, Alaska, and Sitka, Alaska. The work covered by the basic contract was later augmented by various supplemental agreements and change orders which increased the scope of the contract. Supplemental agreement No. 4 extended it

expansion of government-owned facilities to supplement the existing arsenals. These plants, known as "government-owned and contractor-operated arsenals" were operated under the supervision of the ordnance department. The Twin Cities Ordnance Plant was a public arsenal. Its construction served a military purpose only and the lumber shipped for use in its construction was military property.

In January, 1942, plaintiff transported liquid paving asphalt consigned to the Civil Aeronautics Administrator, Seattle, Washington, and marked "For Export". The asphalt was shipped for use in the construction of the runways of the airport at Cold Bay, Alaska, built with United States' funds on public lands reserved for the use of the Navy Department. History discloses that the Cold Bay airfield, now known as Fort Randall, was a vital defense of key points in Alaska, and when the Japanese invaded the Aleutians, American bombers, based at Cold Bay, Alaska, repulsed the enemy attack aimed at Dutch Harbor. The construction of this air field as a national defense was a military project, and the asphalt was military property.

Plaintiff's counsel have cited, in support of its claims, the case of Leigh R. Powell, et al. vs. United States, decided

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to cover Dutch Harbor by adding an air base at Unalaska. The actual location of this station was at Dutch Harbor which was situated on Amaknak Island across the channel from the town of Unalaska. At the inception of the work at Dutch Harbor a portion of Amaknak Island was already designated as a Naval reservation. By Executive Order 8786, all of the public lands, subject to existing rights, were reserved for the use of the Navy Department for Naval aviation purposes. Since October, 1941, the entire island has been a military reservation and all non-military personnel and activities have been excluded therefrom.

"Article 22 of the contract provides that 'Only such commissary, recreational, and amusement facilities as may be approved by the Contracting Officer shall be installed or located on the various sites of the work under the contract. No such facilities shall be operated on a profit-making basis.' The alleys were procured on contractor's purchase order, approved by the Resident Officer in charge. They were installed in a semi-permanent wood-construction building at Dutch Harbor. This building was constructed under the authorization of Article 22 of the Contract with the

Dec. 13, 1945, by the United States Circuit Court of Appeals for the Fourth Circuit. The issues in that case are readily distinguishable from those involved in this action. The shipment in the Powell case was phosphates owned by the United States and shipped to the British Ministry of Transport under the Lend-lease Act for use as fertilizer by the farmers of Great Britain. The Court found, in accordance [fol. 18] with the facts, that lend-lease goods were divided into three classes,—(1) military, (2) industrial, and (3) agricultural,—and that the fertilizer was agricultural and not military property. All the shipments in issue in this action were required and used in the defense of the United States and in the furtherance of its war effort, and were shipments of military or naval property of the United States, moving for military or naval use and not for civil use.

After the commencement of this action, plaintiff withdrew its claim against the defendant as set forth in Paragraph IX of the complaint, in the sum of $36.33, and defendant admitted liability on plaintiff's claim described in paragraph IV of the complaint, in the sum of $319.33.

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approval of the Contracting Officer and the Officer in Charge. The building was originally intended to serve first as a recreation center for the contractor's men and then as a recreational center for military personnel occupying the station, a procedure that was adopted as an economy measure to eliminate the expenditure of additional funds to provide recreational facilities for military personnel. Actually, the structure was completed at about the time (December, 1942) that all civil workmen were evacuated from the station, the construction work was taken over by the Seabees, and the facilities were never used by civilians.

"The construction work performed by civilian employees of the contractor was considered essential by the Navy Department. Due to remoteness, rough weather, difficult working conditions and boredom in off-hours, it was very difficult to keep civilian employees on the job. Despite recruitment under agreement whereby workmen had to pay their own transportation back to the states if they quit before the contract was terminated, the labor turn-over was inordinately high. The average stay of civilian workmen on the job was only 63 days. The recreation hall and theatre were projected and constructed for the purpose of

Plaintiff is entitled to judgment against the defendant on the claim described in paragraph IV of the complaint, in the sum of Three Hundred Nineteen and 33/100 Dollars ($319.33), and its prayer for judgment on all other claims in the complaint is denied.

Dated this 15th day of January, 1946.

Patrick T. Stone, United States District Judge, Western District of Wisconsin.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

Findings of Fact and Conclusions of Law—Filed February 21, 1946

The above entitled cause came on for trial and hearing before this Court, Honorable Patrick T. Stone, Judge, presiding without a jury, upon the 26th day of October, 1945. Mr. L. B. daPonte appeared for plaintiff, and Messrs. Charles H. Cashin, United States District Attorney and

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expediting completion of the necessary military and naval installations.

"The contractor was a joint venture comprised of Siems-Spokane Co., Johnson Drake and Piper, Inc., and Puget Sound Bridge and Dredging Co., organized for the sole purpose of performing work under contract NOy3570. It performed no work other than that covered by the contract. Control of movement of materials from the island was at all times under the control of the military authorities and construction was entirely under control of the Resident Officer in Charge." • • •

"13. On or about January 26, 1942, plaintiff and its connecting carrier, Southern Pacific Railroad Company, transported on Government bill of lading No. CCA-8918 from Richmond, California, to Seattle, Washington, 1,259 barrels of liquid paving asphalt loaded in eight cars and weighing, with dunnage, 604,365 pounds, shipped by the Standard Oil Company of California consigned to the Civil Aeronautics Administrator, Alaska Project Warehouse, 219 Terry Avenue North, Seattle, Washington, and marked 'For Export,' • • •.

Hubert H. Margolies, Attorney, Department of Justice, appeared for the defendant.

A stipulation of facts was entered into on behalf of the parties and filed with the Court. The matter was fully argued and the cause submitted to this Court for its determination and decision. The Court, being fully advised in [fol. 19] the premises, on the pleadings, the stipulation and the proceedings had herein, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

This action was commenced under the Tucker Act to recover from the defendant freight charges on interstate shipments of Government property by the Northern Pacific Railway Company as the sole, or in some instances, as terminal carrier. Plaintiff submitted its bills to the defendant at published tariff rates. The defendant, claiming that reduced rates on account of land-grant distance under Section 321 (a) of the Transportation Act of 1940 (49 U. S. C.

"The symbol 'DLAND—Supplemental—1942' appearing on the second line of the bill of lading identifies this asphalt as having been purchased and shipped for use in connection with an airport project under a program entitled 'Development of Landing Areas for National Defense' carried on by Civil Aeronautics Administration. The symbol '9-206', also appearing on the second line of the bill of lading identifies this particular shipment as being for use in connection with the airport project at Cold Bay, Alaska. The paving asphalt was used for the construction of the airport at Cold Bay, Alaska, in place of concrete, which is unsuitable to the terrain. Unlike most DLAND projects which are built on land owned by states, counties, cities and other political subdivision, the airport at Cold Bay was built without sponsor on public lands owned by the United States and reserved for the use of the Navy Department by Executive Order No. 5214, dated October 30, 1929.

"Funds for the construction of the airport were derived from appropriations made for 'Development of Landing Areas for "National Defense" ' under various appropriation acts passed by the 76th and 77th Congress. These appropriations were for 'the construction, improvement

Section 65 (a)) were applicable, deducted the differences between the published tariff rates and the reduced rates on account of land-grant distance, in some instances from the original bills and in other instances from subsequent bills.

II

Plaintiff has satisfied the requirements for maintaining a suit against the United States under the Tucker Act, Act of March 3, 1887, as amended, U. S. C. Title 28, Sections 41 (20) and 761-5.

III

Northern Pacific Railroad Company was incorporated by the Act of July 2, 1864 (13 St. L. 365), supplemented by Joint Resolution of May 31, 1870 (16 St. L. 378), with power to construct a railroad and telegraph line from a point on Lake Superior in Wisconsin to Puget Sound, and from Portland, Oregon, to Puget Sound. By Sec. 2 of said Act the right of way over public lands was granted, and by Sec. 3 the Company received a grant of lands in aid of construction "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to

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and repair of public airports and public landing areas in the United States and its territories and possessions, determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense. . .' The determination for an airport at Cold Bay, Alaska, was made by the administrator and duly approved by the Board. Installations at landing areas were built at the request of or in consultation with the War or Navy Department, and in accordance with the desires of the Alaska Defense Command. In the winter of 1941-42, the Alaska Defense Command considered Cold Bay the most important field in Alaska and urged its completion at the earliest possible moment. On December 15, 1941, Major General S. B. Buckner, Jr., from the Headquarters Alaska Defense Command, Fort Richardson, Alaska, advised the Civil Aeronautics Administration that the field at Cold Bay was 'vital to the immediate defense of key points in Alaska' and in a letter of that day listing the order of priority for the preparation of airfields in Alaska he placed the Cold Bay project first in importance.

secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway . . . ." In 1896 said railroad passed [fol. 20] to the Northern Pacific Railway Company, plaintiff herein, which succeeded to all of the rights and obligations of said Northern Pacific Railroad Company.

IV

Sec. 11 of said Act of July 2, 1864, provides that the Northern Pacific Railroad Company, or any part thereof shall be a post route and a military road subject to the use of the United States for postal, military or naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation. Sec. 20 of the Act, "to secure to the government at all times (but particularly in time of war)" the use and benefits of the railroad for postal, military, and other purposes, reserves to Congress the right to add to, alter, amend or repeal the Act, having due regard for the rights of the railroad.

"Stripping and grading operations were commenced in August, 1941. At this time the situation in the Pacific was critical. After one of the runways had been graded, the War Department began the second runway with troop labor. Soon after, and prior to the completion of the contract, and on or about May 30, 1942, the contractor was ordered to vacate the site and the project was taken over by the Army. The War Department took over all the asphalt, expanded the runway length from 5,000 to 7,500 feet, and finished the job. The War Department has since been in complete control of the field, which is now known as Fort Randall. The Army has operated and maintained the landing area and the radio facility constructed by CAA at the same time.

"At the time of the invasion of the Aleutians by the Japanese, the field at Cold Bay played an important part in the defense of Alaska. The unexpected appearance of bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor shortly after the contractors were ordered to vacate the site. The Cold Bay project had been kept secret because of the military situation."

V

By the Army Appropriation Act of June 7, 1924, 43 Stat. 486, 10 U. S. C. A. § 1375, it was provided as follows:

> "Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States * * * over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service."

VI

Rates for government transportation over land grant routes continued to be fifty per cent of published rates until the Transportation Act of 1940 was enacted. That Act relinquished the Government's right to reduced rates for [fol. 21] transportation of its property, except military or naval property moving for military or naval and not for civil use, upon condition that railroads having received a land-grant should file releases of any claims they had against the United States to additional lands, or compensation for lands to which they might be entitled under the grants.

VII

Prior to performance of the transportation services in question, plaintiff and other carriers concerned duly filed the required releases, and they were approved by the Secretary of the Interior. The full applicable commercial rates, fares and charges are payable by the United States for transportation by any common carrier subject to the Interstate Commerce Act, of any property for the United States or on its behalf, except "military or naval property of the United States moving for military or naval and not for civil use," and except where special rates applicable to the shipments by the United States may be in effect.

VIII

Upon filing and approval of releases, including the release of the Northern Pacific Railway Company, which was approved by the Secretary on April 16, 1941, the Secretary of the Interior issued and published the statement attached to the stipulation and marked Exhibit "A." The lawsuit referred to on page 2 of the Secretary's statement was filed pursuant to the Act of June 25, 1929 (46 St. L. 41), which expropriated to the United States all lands within the limits of forest reserves to which the Railway Company might be found to be entitled in said suit, upon payment to the Railway Company by the United States of just compensation therefor. Suit was brought pursuant to this Act. A final decree was rendered, which was affirmed in part and remanded in part by the decision of the Supreme Court in *United States v. Northern Pacific Railway Company*, 311 U. S. 317. By the decision of the Supreme Court it was finally adjudged that the Northern Pacific Railway Company was entitled to patents to 428,986.68 acres, carried in the Railway Company's inventory at a value of approximately $1,400,000, which the Northern Pacific Railway [fol. 22] Company released pursuant to the Transportation Act of 1940. In addition thereto, the Northern Pacific Railway Company released claims which it asserted against the United States in said suit for compensation for expropriated lands, amounting to a total of 1,453,061.02 acres which it claimed in said suit to be of the fair value of $14,468,649.06. Upon filing of said release by the Northern Pacific Railway Company, said suit was dismissed.

IX

In open court counsel for defendant withdrew its defense to the claim asserted in paragraph IV of the complaint and admitted liability to plaintiff at the published rates on the shipments of coal under War Department contract to Fort Missoula, Montana, in June 1941 for its maintenance. At the time the Fort was not occupied or used by the Army for military forces or by military personnel but was in use by the Immigration and Naturalization Service of the Department of Justice, under a revocable permit from the War Department, for the detention and safekeeping of alien sailors, Italians and Germans, who had entered the United States without having complied with the immigration laws or were

in the United States following removal from ships scuttled in American ports. Some of the seamen were taken into custody because of acts of sabotage to their own ships; others were delivered to the custody of the Immigration and Naturalization Service from the Canal Zone. The seamen were detained pending the time when they could be deported to the country whence they came. They were detained at Fort Missoula in June, 1941, when the shipments were made and received, and for many months thereafter.

X

During the month of August, 1941, plaintiff, in connection with the New York, New Haven and Hartford Railroad Company, the Erie Railroad Company, and Chicago and North Western Railway Company, transported on Government bill of lading N686622 from Pawtucket, Rhode Island, to Tacoma, Washington, in connection with contract NOs-88648, and plaintiff there delivered to the consignee 15,780 pounds of insulated copper cable shipped by the inspector [fol. 23] of naval material, United States Navy, Boston, Massachusetts, consigned to District Material Officer, Thirteenth Naval District, c/o Seattle-Tacoma Shipbuilding Company for Maritime Commission, Hull 123.

The insulated copper cable was furnished and transported by the Navy Department of the United States for the purpose of being used in the installation of degaussing equipment (to neutralize magnetic mines) on Hull No. 123. Hull No. 123 was a single screw cargo vessel built by the Seattle-Tacoma Shipbuilding Corporation pursuant to a contract entered into on October 9, 1939, between the Seattle-Tacoma Shipbuilding Corporation and the Maritime Commission of America.

In accordance with the provisions of subsection (b) of Sec. 501 of the Merchant Marine Act of 1936, as amended (46 U.S.C., Sec. 1151 (b)) the plans and specifications for the construction of Hull No. 123 were submitted to the Navy Department for suggestions as to changes that should be made, in order that the vessel might be suitable for conversion into a military or naval auxiliary or suitable to the United States in time of war.

In 1940, while this vessel was under construction, it was determined by the Navy Department and the Maritime Commission that all vessels under construction by the Maritime

Commission should have degaussing equipment. Discussions between the Navy Department and the Maritime Commission resulted in the adoption of the following procedure for equipping Maritime Commission vessels under construction:

> Degaussing specifications would be prepared by the Navy Department and transmitted to the Maritime Commission for forwarding to the Commission's ship contractor. Responsibility was placed on the Maritime Commission to make all necessary arrangements with the shipbuilders in accordance with the specifications furnished by the Navy Department. All degaussing equipment was to be furnished by the Navy Department, including additional generating capacity where necessary. The cost of the equipment together with the cost of transportation was to be borne by the Navy Department. During the installation of the equipment the Navy Department would act in an advisory capacity, providing technical information whenever necessary.

[fol. 24] Specifications for the degaussing equipment for Hull No. 123, later known as the S. S. Idaho, were furnished by the United States Navy Department, which acted in an advisory capacity in the installation, and assumed and paid for the cost of the degaussing equipment and all transportation costs.

Article 9 of the Maritime Commission contract covering the sale of the vessel reads in part as follows:

> "Until the emergency declared by the President of the United States in a proclamation dated September 8, 1939, shall cease to exist, the vessel shall be operated to and from such port or ports and under such conditions as the Commission shall direct."

Since the date of its delivery on September 8, 1941, the vessel has been operated as directed by the Maritime Commission, or War Shipping Administration.

The lawfully published tariff rate in effect at the time and applicable to the transportation of copper wire, was $3.43 per 100 pounds, and the applicable commercial charge for the transportation of a like commercial shipment would be the sum of $549.14. Plaintiff duly rendered its bill No. FK-10224 in the sum of $549.14 to the Bureau of Supplies

and Accounts of the United States Navy and in November, 1941, the amount of said bill was paid in full to the plaintiff. Thereafter, and on or about July 8, 1942, the General Accounting Office of the United States notified plaintiff that credit for $204.59 paid to plaintiff on said bill No. FK-10224 would be withheld or a charge raised in plaintiff's next statement of settlement, on account of land-grant deductions on said shipment, unless a satisfactory explanation were promptly made or the amount deposited. Plaintiff thereupon refused to deposit said amount and on or about February 22, 1943, the Navy Department, over plaintiff's written protest, deducted the said sum of $204.59 from the amount found to be due plaintiff on its bill No. FR-408 rendered in February, 1943, for other transportation services performed by plaintiff for defendant.

XL

During the months of January and February, 1942, plaintiff transported over its own line, on commercial bills of [fol. 25] lading from Longview, Whites, Everett and Shelton, Washington, to New Brighton, Minnesota, and there delivered to the consignee, seven carloads of lumber, shipped by various lumber companies, consigned to the U. S. Area Engineer, Twin Cities Ordnance Plant in care of Foley Brothers, Inc., and Walbridge, Aldinger Company, as follows:

Car No.	From	Date Shipped	Date Delivered	Weight
90276 PMCKY	Longview	2/ 3/42	2/12/42	80,660 lbs.
60989 NP	Longview	2/ 3/42	2/13/42	83,880 "
43202 PMLE	Longview	2/ 5/42	2/15/42	73,040 "
93083 PM	Whites	2/ 5/42	2/14/42	65,320 "
72272 WLE	Everett	2/ 6/42	2/16/42	68,080 "
13844 NP	Shelton	1/28/42	2/ 9/42	83,660 "
17392 NP	Shelton	2/ 2/42	2/14/42	87,780 "

Twin Cities Ordnance Plant at New Brighton, Minnesota, was constructed for the United States, under authority of the Secretary of War, for the manufacture of .30 and .50 caliber ammunition pursuant to a cost-plus-fixed-fee construction and operation contract, Contract No. W-ord-527, entered into in July, 1941, with the Federal Cartridge Corporation of Minneapolis, Minnesota. The plant was con-

structed on a site furnished and made available by the Government, which is, and at all times has been, the owner of the plant facility known as Twin Cities Ordnance Plant. Foley Bros. and Walbridge, Aldinger Company, as a joint venture, were the authorized and approved subcontractors for the construction services. The plants were to have an average daily capacity based on twenty-four (24) hours of operation per day, of 2,000,000 rounds of caliber .30 ammunition and 600,000 rounds of caliber .50 ammunition. By supplemental contract in January, 1942, the plant was expanded to provide a capacity of 5,000,000 rounds of caliber .30 and 1,600,000 rounds of caliber .50.

Construction of the plant project was under the supervision of the Quartermaster Corps, United States Army, from July 17, 1941, to December 15, 1941. Thereafter, all construction work at the Project was under the supervision of the Corps of Engineers, United States Army. The plant was constructed in three parts, known as Plant 1, Plant 2, [fol. 26] and Plant 2 Expansion. The buildings of Plant 1 were constructed largely of steel, brick and concrete and were substantially complete on or about June 30, 1942. Plant No. 2 and Plant No. 2 Expansion were started January 7, 1942, and completed on or about January 15, 1943. They consisted of several large manufacturing buildings with the necessary additional buildings, all of wood construction.

The Purchase Orders for lumber for the construction of Plant No. 2 and Plant 2 Expansion were issued against Purchase Allocations issued by the Office, Chief of Engineers, Washington, D. C. As contractors for the project Foley Bros., Inc., and Walbridge, Aldinger issued requisitions for purchase of the amounts of lumber they estimated would be required. On receipt of such requisitions the Area Engineer advised the Office, Chief of Engineers, as to such requirements. That Office issued allocations therefor, and on receipt of such allocations, the contractor issued Purchase Orders to Vendors.

All of the lumber shipments in question were used in the construction of Plant 2 and Plant 2 Expansion. Title to all work completed or in the course of construction, and title to all materials, vested in the Government when designated by its Contracting Officer, and the Government reserved the right to furnish any materials necessary for the completion of the work. The Office, Chief of Engineers, acted as a

central procuring agency for lumber used in the construction of the ordnance plant and issued allocations for the purchase of said lumber. Since January, 1943, the ordnance plant has been engaged in the manufacture of .30 and .50 caliber ammunition for use by the armed forces of the United States in the present emergency.

The lawfully published tariff rate on lumber from the origin point of each of said shipments to New Brighton, Minnesota, in effect at the time and applicable to each of said shipments, was 65.5 cents per one hundred pounds, and the full commercial charges for the transportation of like commercial shipments would amount to the sum of $3,552.84.

Each of the commercial bills of lading covering said shipments contained a notation that it was to be converted into Government bill of lading at destination, and upon delivery of said shipments Government bills of lading Nos. WQ 4668888, WQ4668907, WQ4668913, WQ4668908, WQ4668923, WQ4668924, and WQ4668925, respectively, duly accomp- [fol. 27] lished, were surrendered to plaintiff in exchange for said commercial bills of lading and in lieu of payment of freight charges. Thereafter, plaintiff rendered its bill No. FN-2593 for the sum of $3,552.84 for the transportation of said shipments to the Finance Office, United States Army, and in April, 1942, the amount of said bill was paid in full to plaintiff. Thereafter, and on or about May 26, 1943, the Claims Division of the General Accounting Office of the United States notified plaintiff that in the audit of said bill of overpayment amounting to the sum of $1,727.11, account land-grant deductions, had been noted, and that pursuant to Sec. 322 of the Transportation Act of 1940, 54 Stat. 955, a deduction of said amount would be made from an amount otherwise due plaintiff unless said alleged overpayment were refunded within sixty days. Plaintiff refused to refund said amount, or any portion thereof, and thereafter, in November, 1943, the Finance Office, United States Army, acting upon instructions from said General Accounting Office, over plaintiff's written protest, deducted said sum of $1,727.11 from the amount found to be due plaintiff on its bill No. FR-43438 rendered in October, 1943, for other transportation services performed by plaintiff for defendant.

Such of the transportation charges as were proper were commitments under appropriations made by Congress for Military Activities, for Expediting Production of Equipment and Supplies for National Defense, 1940-43, see Title

III, Military Appropriation Act 1942 (Third Supplemental National Defense Appropriation Act, 1942) 55 Stat. 810; Title IV, Military Appropriation Act, 1942 (Fourth Supplemental National Defense Appropriation Act, 1942), 56 Stat. 38; and Title V, Military Appropriation Act, 1942, (Fifth Supplemental National Defense Appropriation Act, 1942) 56 Stat. 128.

XII

On or about May 10, 1943, plaintiff transported over its own line of railroad on Government bill of lading No. M-121708-43 from Bucoda, Washington, to Minneapolis, Minnesota, and there delivered to the consignee, 113,120 pounds of fir lumber loaded in car No. PLE 46525, shipped by Mutual Lumber Company, consigned to Depot Quartermaster, Aaron Carlson care Crown Iron Works, at Minneapolis, Minnesota, for United States Marine Corps.

[fol. 28] The lumber was shipped to be urea salts treated, kiln dried, milled and manufactured into trestle balks and ponton balks, sills, and chess, at the Crown Iron Works at Minneapolis. The balks, sills and chess are necessary members of a certain type of ponton or demountable floating bridge required to move military personnel and vehicles of war across water barriers: The trestle and ponton balks manufactured from the lumber shipped in Car No. PLE 46525 are now overseas in connection with military and naval operations or have been used in construction of ponton bridges and temporary piers used at Camp Lejeune, North Carolina, and Quantico, Virginia, for training of combat engineers.

The lawfully published tariff rate on fir lumber from Bucoda, Washington, to Minneapolis, Minnesota, in effect at the time was 69 cents per one hundred pounds, and the full commercial freight charges for the transportation of a like commercial shipment would amount to $780.53. Plaintiff presented its bill No. F-R-20168 to the Quartermaster Department, United States Marine Corps, for the sum of $780.53 on account of the transportation of said shipment, but said department deducted the sum of $388.04 from said bill on account of land-grant distance and paid to plaintiff only the sum of $392.49. Plaintiff accepted said sum under protest and as part payment only and notified the Quartermaster General, United States Marine Corps, that it reserved the right to sue for the unpaid balance of said bill.

XIII

On or about February 13, 1942, plaintiff and its connecting carriers, the Grand Trunk Railroad and the Chicago & North Western Railway Company, transported on Government bill of lading No. N-845519 from Muskegon, Michigan, to Seattle, Washington, and plaintiff there delivered to the consignee, 29,087 pounds of bowling alley outfits loaded in Milw. Car No. 6054, shipped by Inspector of Naval Material consigned to the Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy3570. On or about February 26, 1942, the said equipment was received by the Alaska Steamship Company for transportation on the ship Mt. McKinley to Dutch Harbor, Alaska.

[fol. 29] Contract NOy3570 was entered into pursuant to the provisions of the Acts of April 25, 1939 (53 Stat. 590) and May 25, 1939 (53 Stat. 757, 772) authorizing the construction, development and increase of naval aviation bases in various designated areas, including Alaska. The basic contract covered construction of Naval Air Bases at Kodiak, Alaska, and Sitka, Alaska. The work covered by the basic contract was later augmented by various supplemental agreements and change orders which increased the scope of the contract. (A copy of the contract with supplements was introduced at the Hearing herein.) Supplemental Agreement No. 4 extended it to cover Dutch Harbor by adding an Air Base at Unalaska. The actual location of this station was at Dutch Harbor which was situated on Amaknak Island across the channel from the town of Unalaska. At the inception of the work at Dutch Harbor, a portion of Amaknak Island was already designated as a Naval reservation. By Executive Order 8786, all of the public lands, subject to existing rights, were reserved for the use of the Navy Department for Naval aviation purposes. Since October, 1941, the entire island has been a military reservation and all nonmilitary personnel and activities have been excluded therefrom.

Article 22 of the contract provides that "only such commissary, recreational, and amusement facilities as may be approved by the Contracting Officer shall be installed or located on the various sites of the work under the contract. No such facilities shall be operated on a profit-making

basis." The alleys were procured on contractor's purchase order, approved by the Resident Officer in charge. They were installed in a semi-permanent wood construction building at Dutch Harbor. This building was constructed under the authorization of Article 22 of the contract with the approval of the Contracting Officer and the Officer in Charge. The building was originally intended to serve first as a recreation center for the contractor's men and then as a recreational center for military personnel occupying the station, a procedure that was adopted as an economy measure to eliminate the expenditure of additional funds to provide recreational facilities for military personnel. Actually, the structure was completed at about the time (December,1942) that all civil workmen were evacuated from the station, the construction work was taken over by the Seabees, and the facilities were never used by civilians. [fol. 30] The construction work performed by civilian employees of the contractor was considered essential by the Navy Department. Due to remoteness, rough weather, difficult working conditions and boredom in off-hours it was very difficult to keep civilian employees on the job. Despite recruitment under agreement whereby workmen had to pay their own transportation back to the states if they quit before the contract was terminated, the labor turn-over was inordinately high. The average stay of civilian workmen on the job was only 63 days. The recreation hall and theatre were projected and constructed for the purpose of expediting completion of the necessary military and naval installations.

The contractor was a joint venture comprised of Siems-Spokane Co., Johnson Drake and Piper, Inc., and Puget Sound Bridge and Dredging Co., organized for the sole purpose of performing work under contract NOy3570. It performed no work other than that covered by the contract.

Control of movement of materials from the island was at all times under control of the military authorities and construction was entirely under control of the Resident Officer in Charge.

The lawfully published tariff rate in effect at the time and applicable to a shipment of such equipment was $2.48 per one hundred pounds, and the full applicable commercial

freight charges for the transportation of like commercial shipments would amount to the sum of $720.11. Plaintiff duly rendered its bill No. FN-3734 for the transportation of said shipment, in the amount of $792.71, based on an erroneous rate of $2.73 per one hundred pounds, to the Bureau of Supplies and Accounts of the Navy Department of the United States. The amount thereof was paid in full to plaintiff on or about April 9, 1942. On or about April 27, 1943, the Claims Division of the General Accounting Office of the United States notified plaintiff that in the audit of said bill No. FN-3734 an overpayment in the amount of $394.15, account a change in the gross commercial rate and land-grant deductions, had been noted, and that pursuant to Sec. 322 of the Transportation Act of 1940, a deduction of said amount would be made from an amount otherwise due plaintiff, unless said alleged overpayment were refunded within sixty days. Plaintiff refused to refund said amount or any part thereof and thereafter, during the month of November, 1943, the Disbursing Officer of the Bureau of Sup- [fol. 31] plies and Accounts of the Navy Department, acting upon instructions from said General Accounting Office of the United States, deducted the sum of $394.15 from the amount found to be due plaintiff on its bill No. FR-39047 for other transportation services performed by plaintiff for said bureau of Supplies and Accounts.

XIV

Prior to the argument herein plaintiff dismissed, with prejudice, its claim for additional freight charges on the shipment described in paragraph IX of its complaint and paragraph 12 of the Stipulation, consisting of Kohler fittings for use in Navy Barracks No. 2 at the Dutch Harbor Station by personnel of the Navy Department.

XV

On or about January 26, 1942, plaintiff and its connecting carrier, Southern Pacific Railroad Company, transported on Goverment bill of lading No. CCA-8918 from Richmond, California, to Seattle, Washington, 1,259 barrels of liquid paving asphalt loaded in eight cars and weighing, with dunnage, 604,365 pounds, shipped by the Standard Oil Company of California consigned to the Civil Aeronautics Administrator, Alaska Project Warehouse, 219 Terry

Avenue North, Seattle, Washington, and marked "For Export," as follows:

Car No.		Lading	Weight
S. P.	84421	162 bbls.	77,803 lbs.
S. P.	32533	152 "	73,106 "
L. V.	60264	152 "	72,932 "
S. P.	63703	161 "	77,201 "
S. P.	29926	164 "	78,727 "
C. B. & Q.	16386	152 "	73,038 "
S. P.	36177	152 "	72,818 "
P. M.	90546	164 "	78,740 "
		1,259 "	604,365 "

The symbol "DLAND—Supplemental—1942" appearing on the second line of the bill of lading identifies this asphalt as having been purchased and shipped for use in [fol. 32] connection with an airport project under a program entitled "Development of Landing Areas for National Defense" carried on by Civil Aeronautics Administration. The symbol "9-206," also appearing on the second line of the bill of lading identifies this particular shipment as being for use in connection with the airport project at Cold Bay, Alaska. The paving asphalt was used for the construction of the airport at Cold Bay, Alaska, in place of concrete, which is unsuitable to the terrain. Unlike most DLAND projects which are built on land owned by states, counties, cities and other political subdivisions, the airport at Cold Bay was built without sponsor on public lands owned by the United States and reserved for the use of the Navy Department by Executive Order No. 5214, dated October 30, 1929.

Funds for the construction of the airport were derived from appropriations made for "Development of Landing Areas for 'National Defense'" under various appropriation acts passed by the 76th and 77th Congress. These appropriations were for "the construction, improvement and repair of public airports and public landing areas in the United States and its territories and possessions, determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense . . ." The determination for an air-

port at Cold Bay, Alaska, was made by the administrator and duly approved by the Board. Installations at landing areas were built at the request of or in consultation with the War or Navy Department, and in accordance with the desires of the Alaska Defense Command. In the winter of 1941-1942, the Alaska Defense Command considered Cold Bay the most important field in Alaska and urged its completion at the earliest possible moment. On December 15, 1941, Major General S. B. Buckner, Jr., from the Headquarters Alaska Defense Command, Fort Richardson, Alaska, advised the Civil Aeronautics Administration that the field at Cold Bay was "vital to the immediate defense of key points in Alaska" and in a letter of that day listing the order of priority for the preparation of airfields in Alaska he placed the Cold Bay project first in importance.

Stripping and grading operations were commenced in August, 1941. At this time the situation in the Pacific was critical. After one of the runways had been graded, the [fol. 33] War Department began the second runway with troop labor. Soon after, and prior to the completion of the contract, and on or about May 30, 1942, the contractor was ordered to vacate the site and the project was taken over by the Army. The War Department took over all the asphalt, expanded the runway length from 5,000 to 7,500 feet, and finished the job. The War Department has since been in complete control of the field, which is now known as Fort Randall. The Army has operated and maintained the landing area and the radio facility constructed by CAA at the same time.

At the time of the invasion of the Aleutians by the Japanese, the field at Cold Bay played an important part in the defense of Alaska. The unexpected appearance of bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor shortly after the contractors were ordered to vacate the site. The Cold Bay project had been kept secret because of the military situation.

The lawfully published tariff rate in effect and applicable to liquid asphalt was 32 cents per one hundred pounds. Freight charges for the transportation of a like commercial shipment would amount to $1,933.97. Plaintiff duly rendered its bill No. F-N-4746 to the Civil Aeronautics Administration, Department of Commerce, Washington, D. C., in the sum of $1,953.81, comprised of freight charges of

$1,933.97 computed at commercial rates, and alleged reconsigning charges in the amount of $19.84. In May, 1942, the bill was paid in full to plaintiff. On or about May 15, 1943, the Claims Division of the General Accounting Office of the United States notified plaintiff that in the audit of plaintiff's bill No. [redacted]-N-4746, an overpayment in the amount of $855.86, consisting of $836.02 deduction account land-grant and $19.84 reconsigning charges, had been noted, and that deduction of said amount would be made from an amount otherwise due plaintiff unless said alleged overpayment were refunded within sixty days. Plaintiff refused to refund said amount or any part thereof and thereafter during the month of March, 1944, Civil Aeronautics Administration, acting upon instructions from said General Accounting Office of the United States, over plaintiff's protest, deducted said sum of $855.86 from the amount found to be due plaintiff on its bill No. F-R-51806, dated March 11, 1944, for the transportation services performed by plaintiff and connecting carriers for Civil Aeronautics Administration.

[fol. 34] And from the foregoing findings, the Court, in the above entitled cause, now makes and enters the following

Conclusions of Law

I

The Court has jurisdiction of this action under the Tucker Act (paragraph 20 of Sec. 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093, as amended, 28 U. S. C. A., Sec. 41 (20)) and of the parties.

II

That portion of Section 321 (a) of the Transportation Act of 1940 pertinent to these proceedings reads:

> "Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to (the Act) * * * of any * * * property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

III

Each of the shipments described in the foregoing Findings, except the shipment of coal to Missoula, described in paragraph IX, was "military or naval property moving for military or naval and not for civil use," and entitled to land grant rates under Section 321 (a) of the Transportation Act of 1940.

IV

Plaintiff is entitled to judgment against defendant in the sum of $319.33 on the claim described in paragraph IX of the foregoing Findings of Fact.

[fol. 35]

V

Plaintiff is not entitled to recover on the other claims which are described in the foregoing Findings, and the same should be dismissed with prejudice.

Let judgment be entered accordingly.

Dated this 21st day of February, 1946.

Patrick T. Stone, United States District Judge, Western District of Wisconsin.

[File endorsement omitted.]

In the District Court of the United States

Judgment—Filed February 21, 1946

The above entitled cause having been tried before the Court, Honorable Patrick T. Stone presiding, without a jury, upon the 26th day of October, 1945, and the Court having made and filed its Memorandum Opinion dated January 15, 1946, and its Findings of Fact and Conclusions of Law and Order for Judgment dated the 21st day of February, 1946,

Now, Therefore, It Is Ordered, Adjudged and Decreed, that plaintiff, Northern Pacific Railway Company, do have and recover from defendant, the United States of America, the sum of Three Hundred Nineteen and 33/100 Dollars ($319.33) upon the claim described in paragraph IV of its complaint herein, and that the remaining claims described

in said complaint be and they are hereby dismissed with prejudice.

Dated this 21st day of February, 1946.

H. C. Hale, Clerk, U. S. District Court, Western District of Wisconsin.

[File endorsement omitted.]

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL—Filed February 26, 1946

To Whom It May Concern:

Notice is hereby given that Northern Pacific Railway Company, plaintiff, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from that portion of the judgment entered herein on the 1st day of February, 1946, which dismisses with prejudice the claims and demands described in plaintiff's complaint other than the claim described in paragraph IV of its complaint, on which judgment is awarded plaintiff for the sum of $319.33.

Dated this 25th day of February, 1946.

L. B. da Ponte, M. L. Countryman, Jr., Attorneys for Plaintiff, 1018 Northern Pacific Railway Bldg., St. Paul 1, Minnesota.

[File endorsement omitted.]

[fol. 37] IN THE DISTRICT COURT OF THE UNITED STATES

STATEMENT OF POINTS—Filed February 26, 1946

Plaintiff, Northern Pacific Railway Company, hereby submits the following Statement of Points of error asserted and intended to be urged on the appeal of this cause:

I

The Court erred in construing the phrase "military or naval property of the United States moving for military

or naval and not for civil use" in Section 321, Transportation Act of 1940, as including raw or unfinished materials or ingredients moving for use in manufacture of munitions or construction of fortifications, munition plants, naval bases, air fields, cargo vessels, and other facilities required for prosecuting the war.

II

The Court erred in its Conclusion of Law and Judgment that plaintiff is not entitled to recover on the claims which are described in the complaint and Findings of Fact (other than the claim described in paragraphs IV and IX of the complaint), and in dismissing this action with prejudice as to all such claims.

III

The Court erred in deciding that the shipment of insulated copper cable for installation in the hold of a cargo vessel, described in paragraph X of the Findings of Fact, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act of 1940.

IV

The Court erred in deciding that the shipments of lumber for construction of Twin Cities Ordnance Plant, described in paragraph XI of the Findings of Fact, was military or [fol. 38] naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act of 1940.

V

The Court erred in deciding that the shipment of lumber described in paragraph XII of the Findings of Fact, to be milled and manufactured into trestle balks and pontoon balks at the Crown Iron Works, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act, 1940.

VI

The Court erred in deciding that the shipment of bowling alley outfits described in paragraph XIII of the Findings of Fact, for recreation of employees of the contractor con-

structing a naval base at Dutch Harbor, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act of 1940.

VII

The Court erred in deciding that the shipments of liquid paving asphalt described in paragraph XV of the Findings of Fact, for use in constructing runways for the public airport at Cold Bay, Alaska, was military or naval property moving for military or naval and not for civil use, and entitled to land grant rates under Section 321(a), Transportation Act, 1940.

L. B. da Ponte, M. L. Countryman, Jr., Attorneys for Plaintiff, Northern Pacific Railway Company, 1018 Northern Pacific Ry. Bldg., St. Paul 1, Minnesota.

[File endorsement omitted.]

[fols. 39-40] Cost Bond on Appeal for $250.00 filed Feb. 26, 1946, omitted in printing.

[fol. 41] In the District Court of the United States

Stipulation for Inclusion of Additional Material for Supplemental Record on Appeal—March 12, 1946

It Is Stipulated between counsel for the respective parties that the record on appeal may be supplemented and certified by the Clerk to include:

1. The originals of Defendant's Exhibits 1 and 2.
2. Page 3 Reporter's Transcript of Proceedings.
3. That part of Reporter's Transcript of Proceedings beginning with the words "Now, the next item is plumbing fixtures." at page 10 and ending with the phrase "all the questions we are concerned with.", at page 11.

That portion of the Reporter's Transcript of Proceedings beginning with the words "Now, because of the importance of this cost-plus shipment, if there is any question being raised as to the passage of title to the United States" at page 74, and ending with the phrase "to the Twin Cities

Ordnance Plant was in the United States." at page 75; and beginning with the words "Now, coming back to the question of whether the United States had title to the lumber" at page 79, and ending with page 86 inclusive.

Charles H. Cashin, Attorney for Defendant; L. B. da Ponte, M. L. Countryman, Attorneys for Plaintiff.

Dated: March 12, 1946.

[fol. 42] IN THE DISTRICT COURT OF THE UNITED STATES

DESIGNATION OF RECORD ON APPEAL—Filed February 28, 1946

Pursuant to Rule 75, Rules of Civil Procedure, plaintiff, Northern Pacific Railway Company, hereby designates the following portions of the Record and proceedings herein to be contained in the Record on Appeal:

(1) Complaint.
(2) Answer.
(3) Stipulation of Facts.
(4) Memorandum Opinion of Judge Stone.
(5) Findings of Fact, Conclusions of Law, and Order for Judgment.
(6) Judgment.
(7) Notice of Appeal.
(8) Appeal Bond.
(9) Statement of Points.
(10) Designation of Record.

L. B. da Ponte, M. L. Countryman, Jr., Attorneys for Plaintiff, Northern Pacific Railway Company, 1018 Northern Pacific Railway Bldg., St. Paul 1, Minnesota.

Due service of this instrument and receipt of copy thereof admitted this 27th day of February, 1946.

Charles H. Cashin, Attorney for Defendant.

[File endorsement omitted.]

[fols. 43-44] Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 45-46] IN THE DISTRICT COURT OF THE UNITED STATES

STIPULATION FOR PRINTING OF RECORD—March 12, 1946

It is stipulated between counsel for the respective parties that the following papers only need be printed as the record on appeal for the hearing in this cause:

1. Findings of Fact, Conclusions of Law, and Order for Judgment.
2. Memorandum Opinion Below.
3. Judgment.
4. Notice of Appeal.
5. Appeal Bond.
6. Statement of Points.
7. Designation of Record on Appeal.
8. Stipulation for inclusion of additional material for supplemental record on appeal.
9. Page 3 Reporter's Transcript of Proceedings.
10. That part of Reporter's Transcript of Proceedings beginning with the words "Now, the next item is plumbing fixtures." at page 10 and ending with the phrase "all the questions we are concerned with.", at page 11.
11. That portion of the Reporter's Transcript of Proceedings begining with the words "Now, because of the importance of this cost-plus shipment, if there is any question being raised as to the passage of title to the United States" at page 74, and ending with the phrase "to the Twin Cities Ordnance Plant was in the United States." at page 75; and beginning with the words "Now, coming back to the question of whether the United States had title to the lumber" at page 79, and ending with page 86 inclusive.
12. This stipulation.

J. B. da Ponte, M. L. Countryman, Attorneys for Plaintiff and Appellant. Charles H. Cashin, Attorney for Defendant and Appellee.

Dated: March 12, 1946. Approved 3-15-46: William M. Sparks, J.

[fols. 47-48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Title omitted]

APPEARANCES FOR APPELLANT—Filed March 12, 1946

The Clerk will enter our appearance as counsel for appellant.

L. B. da Ponte, M. L. Countryman, 5th and Jackson Sts., St. Paul, Minn.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

APPEARANCES FOR APPELLEE—Filed March 13, 1946

The Court will enter our appearance as counsel for appellee.

John F. Sonnett, Washington, D. C., Asst. Atty. Gen. Hubert H. Margolies, Washington, D. C., Atty. Dept. of Justice. Charles H. Cashin, Madison, Wisconsin, United States Attorney.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—June 5, 1946

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by L. B. Da Ponte, counsel for appellant, and by Mr. Hubert Margolies, counsel for appellee, and the Court takes this matter under advisement.

[fol. 52] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for the Western District of Wisconsin

OPINION—Filed July 8, 1946

Before Sparks, Kerner, and Minton, Circuit Judges.

Minton, Circuit Judge. This suit was brought under the Tucker Act[1] to recover the difference between freight charges billed by the plaintiff at the full tariff rates and the amounts paid by the defendant at land grant rates for transportation of shipments of Government property. The parties entered into a stipulation of the facts which was adopted by the District Court as its findings of fact.

Judgment from which this appeal is taken was entered dismissing plaintiff's claim to recover freight charges on five shipments. The error relied upon is the District Court's conclusion of law that each of the five shipments was "military or naval property moving for military or naval; and not for civil use," and entitled to land grant rates under Section 321(a) Transportation Act, 1940.

The facts as to the five shipments in controversy are as follows:

[fol. 53] (1) *Copper cable.* In August, 1941, plaintiff and connecting carriers transported from Pawtucket, Rhode Island to Tacoma, Washington, and delivered to consignee, 15,780 pounds of insulated copper cable shipped by Inspector of Naval Material, United States Navy, Boston Massachusetts, consigned to District Material Officer, 13th Naval District, % Seattle-Tacoma Shipbuilding Corporation, for Maritime Commission, Hull 123. The cable was furnished by the Navy Department for use in insulation of degaussing equipment (to neutralize magnetic mines) on Hull 123. Hull 123 was a single screw cargo vessel being built

[1] 28 U. S. C. A. Sec. 41 (20).

by the Seattle-Tacoma Shipbuilding Corporation under contract dated October, 1939, between said shipbuilding corporation and the Maritime Commission. In 1940, while the vessel was under construction, it was decided by the Navy Department and the Maritime Commission that all vessels under construction for the Commission should have degaussing equipment. Specifications for the degaussing equipment for Hull 123, later known as the S.S. Idaho, were furnished by the Navy Department which assumed and paid the cost of installation and all transportation charges. The Hull was delivered on September 8, 1941, and was operated as directed by the Maritime Commission or the War Shipping Administration.

(2) *Lumber for construction of a munitions plant.* In January and February, 1942, the plaintiff transported from plants in Washington to New Brighton, Minnesota, seven carloads of lumber shipped by various lumber companies, consigned to the United States Area Engineer, Twin Cities Ordnance Plant, % Foley Brothers, Inc., and Walbridge, Aldinger Company. The lumber was for the construction of the Twin Cities Ordnance Plant at New Brighton for manufacture of .30 and .50 caliber ammunition under a cost-plus-fixed-fee construction and operation contract entered into in July, 1941, by the War Department with the Federal Cartridge Corporation of Minneapolis, Minnesota. Foley Brothers, Inc., and Walbridge, Aldinger Company were sub-contractors for construction.

(3) *Lumber for construction of pontoons.* In May, 1943, plaintiff transported from Bucoda, Washington, to Minneapolis, Minnesota, 113,120 pounds of fir lumber shipped by Mutual Lumber Company, consigned to Depot Quartermaster, % Crown Iron Works, for United States Marine [fol. 54] Corps. The lumber was shipped to be urea salts treated, kiln dried, milled and manufactured into trestle balks and pontoon balks, sills and chess, at Crown Iron Works pursuant to a contract with the corporation. The trestle and pontoon balks were shipped overseas for construction of a bridge for use in military operation or were used in construction of pontoon bridges and piers at Camp Lejeune, North Carolina, and Quantico, Virginia, for training combat engineers.

(4) *Bowling alleys.* On February 13, 1942, plaintiff and connecting carriers transported from Muskegon, Michigan, to Seattle, Washington, 29,037 pounds of bowling alley outfits, shipped by Inspector of Naval Material consigned to the Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to a Naval Air Base, Dutch Harbor, Alaska. The land on which the air base was constructed was reserved for Navy use. The alleys were procured on a contractor's purchase order and installed in a building at Dutch Harbor. The building was intended for a recreation center for the contractor's men and later as a recreation center for the military personnel at the station.

(5) *Liquid paving asphalt.* On January 26, 1942, plaintiff and connecting carrier transported from Richmond, California, to Seattle, Washington, 1,259 barrels of liquid paving asphalt consigned to Civil Aeronautics Administrator, Alaska Project Warehouse, Seattle, Washington, for export. The asphalt was for use in constructing runways at an airport at Cold Bay, Alaska, under a program entitled "Development of Landing Areas for National Defense," conducted by the Civil Aeronautics Administration. The land on which the airport was constructed at Cold Bay was owned by the United States and reserved for the use of the Navy by executive order. On December 15, 1941, Major General S. B. Buckner, Jr., Headquarters, Alaska Defense Command, Fort Richardson, Alaska, advised the Civil Aeronautics Administration that the field at Cold Bay was vital to the immediate defense of key points in Alaska, and in his letter of that day listing order of priority for the preparation of air fields in Alaska, he placed the Cold Bay project first in importance. At the time of the invasion of the Aleutians by the Japanese, the field at Cold Bay played an important part in the defense of Alaska. [fol. 55] Bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor.

The property was transported on Government bills of lading or commercial bills subsequently exchanged for Government bills. The amount claimed on five shipments is $3,569.75.

The District Court rendered an opinion holding that each of the above shipments was "military or naval property"

within the meaning of Section 321, and from the judgment following this opinion, the Northern Pacific Railway Company appeals.

Prior to the passage of the Transportation Act of 1940, all property owned by the United States moved over land grant routes at land grant rates. From time to time, the Congress has passed legislation relieving the railroads of the obligation to give to the Government certain preferential treatment in rates.[2] The Transportation Act of 1940 carried this legislative tendency further. It provided in Section 321(a):

> "Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty."

At the time of the enactment of the Transportation Act of 1940, it was obvious that the general needs of security demanded a greatly expanded Army and Navy. Such enlarged military and naval forces would demand supplies and equipment far in excess of the then existing reserves. With the war spreading throughout Europe in 1940, and with the knowledge of the meagre and inadequate military strength of the United States, it is most unrealistic to [fol. 56] presume that Congress intended any restrictive meaning of "military and naval property" as used in the Transportation Act of that crucial year. To define "military and naval property" in any narrow sense would be to close one's eyes to the complexities and realities of modern war. We will not impute to Congress such lack of vision.

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[2] Act of July 16, 1892 (27 Stat. 174, 180); The Army Appropriation Act of June 7, 1924 (43 Stat. 486).

We must remember that all government property moving over land grant railways moved at the reduced land grant rates before Section 321(a) was introduced. As originally drawn, Section 321(a) would have made all government property moving over land grant railways move at the regular commercial rates as paid on non-land grant railways. In the Interstate Commerce Committee of the Senate, an exception was inserted which retained the reduced land grant rates on "military or naval property of the United States moving for military or naval and not for civil use." The use to which the property was to be put was the controlling thing. If the property was to be used for military or naval purposes as distinguished from a civil use, the property was military and naval property within the meaning of the Act. We look to the use to which the property was to be put to determine its character for rate paying purposes.

When this Act was passed, Congress was engaged in strengthening our defenses. War was imminent. Congress intended to save from the release of applicable land grant rates whatever of government property was shipped over land grant railways to be *used* by the United States in its military and naval security program. This exception was written for the benefiit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress. All property *used* for military or naval purposes was excepted from the whole category of government-owned properties that had theretofore enjoyed the low rates prevailing on land grant railways, and for those excepted properties the low rates were to continue. That the properties transported and here in question were used for military or naval purposes is apparent from a reading of the descriptions of the *use* to which they were put by the United States. Congress acted while total war raged in Europe and in contemplation of our situation if total war should come to us, which it did. Bowling alleys were used to maintain morale in the far-away Aleutian [fol. 57] Islands where a post of our military and naval forces was established. An Army and Navy cannot long live and fight in foreign lands and waters without a merchant fleet in support, and the protection of that fleet by the use of copper cable is a military and naval purpose. Lumber to make pontoons for training and use of Marines, and materials to make arsenals, were all for military and

naval uses. Any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways, it was a kind of property Congress did not release from the low rates granted by the land grant railways.

Counsel cites *Powell* v. *United States*, 60 F. Supp. 433, 152 F. 2d 228. In this case the United States had shipped phosphate to the British Ministry of Transport to be sent under lend-lease to Britain to be used by farmers there as fertilizer. The Court found that lend-lease goods were divided into three classes: (1) military, (2) industrial, and (3) agricultural. The use here was agricultural and civil as distinguished from military and naval.

Plaintiff contends that the Transportation Act of 1940 is *in pari materia* with the Embargo Act of 1940, the Property Requisitioning Act of 1941, and the National Defense Act of 1941. Plaintiff further argues that since the description of "war materials" is more comprehensive in these Acts than in the Transportation Act, Congress necessarily intended to restrict the meaning of "military and naval property" as used in this Act. We disagree with both contentions. Bouvier's Law Dictionary defines "*in pari materia*" as "upon the same matter or subject." The doctrine is applicable when construing contemporaneous legislation concerned with a specific subject, such as appropriations,[3] railroad rates,[4] and taxes.[5] It is obvious that the Transportation Act of 1940, dealing with railroad rates, is not concerned with the same subject matter as other defense measures so as to call for the application of the rule. Furthermore, the rule of *in pari materia* is resorted to only in cases where the meaning of a statute is ambiguous or doubtful. *District of Columbia* v. *Gladding*, [fol. 58] 263 Fed. 628; *United States* v. *Colorado Northwestern Railroad Company*, 157 Fed. 321, 330. No such situation is presented here.

It is ordered that the judgment of the District Court is Affirmed.

[File endorsement omitted.]

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[3] *Converse* v. *United States*, 62 U. S. 463, 21 Howard 463, 16 L. Ed. 192.

[4] *United States* v. *State of Louisiana*, 290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 181.

[5] *First National Bank* v. *United States*, 25 F. Supp. 816.

In United States Circuit Court of Appeals, Seventh Circuit

9043

Northern Pacific Railway Company, Plaintiff-Appellant

vs.

The United States of America, Defendant-Appellee

Judgment—July 8, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] Supreme Court of the United States

Order Allowing Certiorari—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 57, U. S. vs. Atlantic Coast Line R. R. Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 51264. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 400. Northern Pacific Railway Company, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed August 14, 1946. Term No. 400, O. T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 14 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

LORENZO B. daPONTE,
MARCELLUS L. COUNTRYMAN, JR.,
1018 Northern Pacific Ry. Bldg.,
St. Paul, Minnesota,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1945

No.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

---

Northern Pacific Railway Company, a Wisconsin corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered herein on the 8th day of July, 1946.

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Wisconsin (R. 8-18) is reported in 66 F. Supp. 1. The opinion of the United States Circuit

Court of Appeals for the 7th Circuit is set out in the record on pages 52 to 58.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 8, 1946 (R. 58). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Petitioner, a common carrier subject to the Interstate Commerce Act, was entitled under the provisions of Section 321(a) of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. 65(a), notwithstanding the exception therein contained of "military or naval property of the United States moving for military or naval [redacted] and not for civil use", to charge the full applicable commercial rates for transportation for the United States of any of the following property:

(a) copper cable shipped in August 1941 consigned to District Material Officer, 13th Naval District, Tacoma, Washington, c/o Seattle-Tacoma Shipbuilding Corporation, for use by the Shipbuilding Company in installing degaussing equipment (to neutralize magnetic mines) under specifications furnished by the Navy, in the hull of a cargo vessel being constructed for the Maritime Commission;

(b) lumber shipped in January and February, 1942, consigned to the United States Area Engineer, Twin Cities Ordnance Plant, New Brighton, Minnesota, c/o Foley Brothers, Inc. and Walbridge Aldinger Company for use by the contractors in the construction of an ord-

nance plant erected by the War Department for the manufacture of ammunition;

(c) lumber shipped in May 1943 consigned to Depot Quartermaster, Minneapolis, Minn., c/o Crown Iron Works, to be treated, dried, milled, and manufactured by the Iron Works into trestle balks and ponton balks, sills, and chess, for use by Combat Engineers of the Marine Corps in erecting bridges for military use;

(d) bowling alley outfits shipped in February 1942 consigned to the Officer in Charge, Siems-Drake, Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, for installation there in a recreation center being constructed for use initially by civilian employees of the contractor and later by military personnel;

(e) liquid paving asphalt shipped in January, 1942, consigned to Civil Aeronautics Administrator, Alaska Project Warehouse, Seattle, Washington, for use by him in constructing runways at an airport at Cold Bay, Alaska, on land reserved by Executive order for use of the Navy.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940 are printed as Appendix "A" for convenient reference. Section 321(a) provides that commercial rates shall be paid for transportation by any common carrier subject to the Act of property for or on behalf of the United States; except for transportation of "military or naval property of the United States moving for military or naval and not for civil use". Sec. 321 (b) provides that if any carrier or its predecessor in interest shall have received a grant of lands from the United

States to aid in construction of any part of its railroad, its compensation shall be determined as though subsection (a) had not been enacted until it shall have filed a release with the Secretary of the Interior of any claims it may have against the United States for additional lands or compensation for expropriated lands granted to such carrier or predecessors in interest in aid of construction of its railroad.

STATEMENT

This suit was brought under the Tucker Act (28 U. S. C. A., Section 41(20)) to recover amounts deducted from freight bills for subsequent transportation because of claimed overpayment of bills at comercial rates for transportation of five shipments of Government property.

The case was tried on a stipulation of facts, adopted as Findings of Fact. (R. 18) Petitioner, and other carriers concerned, prior to performance of the transportation, filed releases under Sec. 321 (b). By the decision of this court in *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317, it was adjudged that petitioner was entitled to patents to 428,986.68 acres, valued at approximately $1,400,000, which it duly released; and also released claims which it asserted against the United States for compensation for 1,453,061.02 acres of expropriated lands which it claimed to be of the fair value of $14,468,649.06. (R. 21)

The five shipments are described in the findings (R. 22), and opinion of the Court of Appeals (R. 53, 54), as follows:

1. *Copper Cable.* A shipment in August 1941 from Pawtucket, Rhode Island, to Tacoma, Washington, for contract Nos. 88648, of 15,780 pounds of insulated copper cable by

inspector of naval material to District Material Officer, c/o Seattle-Tacoma Shipbuilding Corporation, for Maritime Commission, Hull 123. The cable was furnished by the Navy Department for use in installation of degaussing equipment (to neutralize magnetic mines) on Hull 123, a cargo vessel being built by the shipbuilding corporation under contract dated October 9, 1939, with the Maritime Commission. Article 9 of the Maritime Commission contract provided that, until the emergency declared by the President in proclamation dated September 8, 1939, shall cease to exist, the vessel shall be operated to and from such ports and under such conditions as the Commission shall direct. The vessel was delivered September 8, 1941, and was operated as directed by the Maritime Commission or war shipping administration. (R. 22)

2. *Lumber for Construction of Munitions Plant.* Shipments in January and February, 1942, from the State of Washington to New Brighton, Minnesota, of seven carloads of lumber by various lumber companies consigned to U. S. Area Engineer, Twin Cities Ordnance Plant, care of Foley Brothers, Inc., and Walbridge, Aldinger Company, for construction by those contractors of Twin Cities Ordnance Plant at New Brighton for manufacture of .30 and .50 caliber ammunition. (R. 24)

3. *Lumber for construction of Pontons.* Shipment in May 1943, from Bucoda, Washington, to Minneapolis, Minnesota, of fir lumber by Mutual Lumber Company, consigned Depot Quartermaster, care Crown Iron Works, for United States Marine Corps. The lumber was to be treated and manufactured into trestle balks and ponton balks, sills

and chess at Crown Iron Works pursuant to a contract. Upon completion, the balks were shipped overseas for construction of a bridge for use in military operations, or were used for construction of ponton bridges or piers at Camp Lejune, North Carolina, and Quantico, Virginia, for training of combat engineers. (R. 27)

4. *Bowling Alleys.* Shipment February 13, 1942, from Muskegon, Michigan to Seattle, Washington, of bowling alley outfits by Inspector of Naval Material to Officer in Charge, Siems-Drake Puget Sound Company, Seattle, Washington, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy3570. That contract was entered into under the Act of April 25, 1939, and Act of May 25, 1939, authorizing construction of naval air bases at Kodiak and Sitka, Alaska. The contract provides that recreational facilities may be installed as approved by the contracting officer. The bowling alleys were procured on contractor's purchase order and installed in a building at Dutch Harbor. The building was intended for recreational center for contractor's men, and later for military personnel. (R. 28)

5. *Liquid Paving Asphalt.* Shipment January 26, 1942, from Richmond, California, to Seattle, Washington, of 1,259 barrels of liquid paving asphalt consigned to Civil Aeronautics Administrator, Alaska Project Warehouse, Seattle, Washington, for export. The asphalt was for use in constructing runways at an airport at Cold Bay, Alaska, under program entitled "Development of Landing Areas for National Defense", conducted by Civil Aeronautics Administration. The airfield was afterwards used by naval planes in the defense of Alaska. (R. 31)

All shipments were transported on Government bills and were, when made, Government property.

The District Court and Circuit Court of Appeals held that each of said shipments was military or naval property within the above-quoted exception of Sec. 321 (a), to which land grant rates apply, and dismissed petitioner's action. (R. 18, 35, 56).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the ~~Eighth~~ Seventh Circuit erred:

1. in holding that the United States was entitled to land grant rates on all or any of the shipments of government property above described;

2. in holding that each of said shipments was military or naval property within the meaning of the exception in said Sec. 321 (a) Transportation Act, 1940;

3. in holding that each of said shipments was moving for military or naval and not for civil use within the meaning of said exception; and in holding that "this exception was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress";

4. in holding that any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways was the kind of property Congress did not release from the reduced rates granted by the land grant railways.

REASONS FOR GRANTING THE WRIT

The Government contends that all shipments of property having any connection with national defense or prosecution of the war are for military or naval use and so entitled to land grant rates. The railroads contend that materials, tools, machinery, etc., used for manufacture of munitions and other military articles; materials and machinery for construction of plants for manufacture of munitions or other military articles; materials and machinery for construcion of recreation facilities for use of a contractor's employees engaged in construction of military or naval facilities; materials and machinery for construction of cargo vessels by the Martime Commission; are not military or naval property moving for military or naval and not for civil use.

This is a test case to obtain an authoritative construction of Sec. 321, Transportation Act, 1940.

Millions of shipments of Government property like or similar to those in question were made during the war years. Freight bills were submitted by the railroads at commercial rates and paid in full under Sec. 322. As audits progressed, very large amounts have been deducted from current bills for other transportation. There are outstanding awaiting audit a vast number of bills claimed to have been overpaid on account of which very large sums will be deducted as audits are completed. There are pending in the Court of Claims suits for large amounts filed by various railroads in which the same or similar questions are presented for decision.

Petitioner is informed that this Court has granted certiorari in Nos. 942 and 943, involving the application of

Sec. 321 (a) to shipments of fertilizer to Great Britain under the Lend-Lease Act. The decision in those cases will not answer the questions presented in this case. An authoritative decision in this case is more urgent than in Nos. 942 and 943, because of the much greater volume of shipments like those in question here and the much larger amount involved.

SUMMARY OF ARGUMENT

If the petition for certiorari be granted, petitioner will elaborate the following points:

1. The Described Shipments are Neither Military nor Naval Property, nor Were They for Military or Naval Use Within the Plain Meaning of Sec. 321 (a).

The definitions of "military" and "naval", quoted in the opinion of the District Court, (R. 14), are as follows:

> "Military"—"of or pertaining to soldiers, arms or war; belonging to, engaged in, or appropriate to the affairs of war; according to the methods and customs of war or armies";
>
> "Naval"—"of or pertaining to ships or shipping; of or pertaining to or connected with, possessing or characteristic of vessels of war or a navy."

Lumber for the construction of a munitions plant or for manufacture of pontons; materials and machinery for construction of cargo vessels, etc., are not *per se* military property. Those articles, when transported for delivery to contractors for constructing a munitions plant, manufacturing

pontons or building a cargo vessel, etc., were not for military use because manufacturing is a civil, not a military or naval activity. It is immaterial that the manufactured article may be military property, because that was not transported. The ingredients and materials used in the manufacture of military property completely lose their identity in the completed article. Tools and machinery are the *instruments of production.* It is as incorrect to say that construction materials, machinery and ingredients used in production are military or naval property as to say that the civilian employes of the contractor were members of the military or naval forces. Attorney General Palmer ruled that an embargo prohibiting exportation of certain articles, including arms, munitions and explosives, did not include machinery for production of those articles. (32 O. A. G. 132) The application given to Sec. 321 (a) by the court below is diametrically opposed to the Attorney General's opinion. Yet that opinion appears to have established the form for legislation of this kind followed ever since. Congress, in other contemporaneous war legislation, observed Attorney General Palmer's opinion, and expressly described "ingredients, component parts, tools, machinery," etc., used in production of the articles concerning which it was legislating. Had Congress intended that Sec. 321 (a) should have the meaning and application given to it below, it would have used express language, as it did in much other contemporaneous war legislation. Thus, in further amending the Anti-Sabotage Act of 1918 (40 Stat. 533) by the Act of August 21, 1941 (55 Stat. 655), Congress defined the words "national-defense material" as follows:

"§104. Definition of national-defense terms:

"The words 'national-defense material', as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense *or for use in or in connection with the producing, manufacturing, repairing, storing mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.*"

The Embargo Act of July 2, 1940 (54 Stat. 712), Sec. 6, defines the subject matter as follows:

"Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, *or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof,* he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. * * *"

The Property Requisitioning Act of October 16, 1941 (55 Stat. 742), is as follows:

"That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, *or component parts thereof, or machinery tools, or materials necessary for the manufacture, ser-*

vicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States * * * "

S. B. 2009, which became Transportation Act, 1940, was introduced in the Seventy-Sixth Congress and enacted September 18, 1940, including Sec. 321. It is impossible to believe that Congress intended that the phrase, "military or naval property moving for military or naval use" should include "component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation thereof." The phrase, as used in Sec. 321, obviously and by plain meaning applies, and was intended to apply, *only to articles shipped to or for use by military or naval personnel as distinguished from* shipments of construction materials, tools and machinery for use of contractors *in manufacturing military or naval property.*

2. The Military and Naval Property Exception in Sec. 321, if of Doubtful Meaning, Will be Strictly Construed.

It is a cardinal rule that an exception contained in a remedial statute will be strictly construed. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299; *Gregg Cartage Company* v. *United States,* 316 U. S. 74; *Pennsylvania R. Co.* v. *United States,* 54 Fed. Supp. 381.

That Sec. 321 (a) is highly remedial, intended to reduce the burden on the railroads resulting from the enormous increase in Government transportation at the inadequate 50 percent of tariff rates, and to limit the discriminations be-

tween places and shippers which were wrecking the policy declared by the Interstate Commerce Act, is established by the report of the House Committee on H. R. 4184, to repeal land grant rates, which is now law. The full report was exhibited to the courts below and will be filed in this court. The conclusion of the committee recommending passage of the bill is printed as Appendix "B".

It is submitted that the court below erred in holding that "this exception was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress."

3. Sec. 321 was an Offer of Partial Relief From the Railroads' Transportation Obligations, and Upon Acceptance by Filing the Release of Claims for Additional Lands Due Under the Grants and Compensation for Expropriated Lands, a CONTRACT Resulted.

The original grant to the Northern Pacific (13 Stat. 365), followed by construction of the railroad, became a *contract. United States* v. *Northern Pacific R. Co.*, 256 U. S. 51. Sec. 321 is an offer of amendment which, upon acceptance by the company, became a term of the original contract. Petitioner made a very considerable sacrifice in releasing lands to which it had been adjudged entitled by this Court of the approximate value of $1,400,000, and claims for expropriated indemnity lands in forest reserves within the limits of its grant of approximately $14,468,649. Other land grant railroads released claims to large amounts of land, all totaling about 8 million acres. Although it is not suggested that Congress balanced the loss against gain, nevertheless, the

consideration was deemed sufficient, especially considering the urgent public policy stated by the House Committee. (Appendix "B"). The original land grant contract has been given a reasonable construction in accordance with the plain meaning of the language used. *United States* v. *G. H. & S. A. Ry Co.*, 279 U. S. 401, presented the question whether mounts of cavalry officers, owned by them although the government paid transportation charges, were property of the United States within the land grant acts. The court said:

> "The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* When considering another question arising under a like provision in a land grant Act, this Court said: 'It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the usus loquendi is a far more valuable aid than the inquiry what might be desirable.' *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454."

Considering Sec. 321 and filing of the release of lands and claims as a contract, the decision below is in direct conflict with this case in holding that the section "was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress." It is no less immoral for the Government to impair the

rights of parties under legislative contracts by subsequent legislation (*Sinking Fund Cases*, 99 U. S. 700), than to accomplish the same result by judicial construction, a result which this Court has consistently refused to sanction. *United States* v. *Standard Rice Co.*, 323 U. S. 106, and cases there cited.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LORENZO B. daPONTE,
MARCELLUS L. COUNTRYMAN, JR.,
Attorneys for Petitioner.

July 31, 1946.

APPENDIX "A"

TRANSPORTATION ACT, 1940

PART II—Rates on Government Traffic

GOVERNMENT TO PAY FULL RATES

Sec. 321 (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That Section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be

procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

DEDUCTION OF OVERPAYMENTS

Sec. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

APPENDIX "B"

EXCERPT FROM COMMITTEE'S REPORT ON BOREN BILL—H. R. 4184

"It is the conclusion of the committee that through the years the Government has gotten all and more than it bargained for in the original land-grant transaction. A statement issued by the General Land Office in 1941 summarized the situation by saying that in return for an 'empire of land' the Government got a transportation system that 'won the West and established a Nation stretching from the Atlantic to the Pacific Ocean.'

"Since that time, however, the Government has received as further and additional consideration on this deal land-

grant deductions amounting to at least $500,000,000. The Committee is of the opinion that the time has come for the Government to close its books on this transaction.

"This conclusion is strengthened by the committee's examination of the actual working in practice of the land grant deduction system. It produces results inconsistent with our transportation policies. Businessmen must deal in the dark as to the rates paid by their competitors where Government contracts are involved, while there is discrimination in rates as among those shippers in position to take advantage of land-grant deductions and those not so situated.

"It is, therefore, the conclusion and recommendation of the committee that this bill to eliminate land-grant deductions should pass. Simple justice demands it; the public interest requires it.

"Among the desirable results to be expected from the enactment of the bill are the following:

"It will remove the discriminations under which industries now labor in competing for sales to the Government by placing them, so far as freight rates are concerned, in the same position with respect to such sales as they are with respect to transactions with private individuals and concerns.

"It will assure all shippers, agricultural and industrial, that their freight bills do not contain hidden taxes to make up for deficiencies in the charges paid by the Government on its traffic.

"It will result in relieving both the Government and the railroads of large expense by removing a source of unending

controversy and litigation between them and by eliminating the necessity for an inordinate amount of accounting and other clerical work in connection with Goverment traffic.

"It will relieve the land-grant railroads of the injustice of being required to continue to make payments on a debt that was long since extinguished.

"It will relieve carriers that received none of the granted lands, including the motor carriers and water carriers as well as the great majority of the railroads, from the injustice of being compelled to reduce their charges on Government traffic in order to meet the competition of the land-grant lines.

"It will remove from the forwarders which received no land grants, the threat of being required to submit to the land-grant deductions on Government traffic handled by them over land-grant lines.

"It will relieve the railroads of uncertainties as to their present revenues and thus enable them to plan more intelligently to meet the inevitable uncertainties of the future."

IN THE

Supreme Court of the United States

October Term, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Petitioner

v.

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER

LORENZO B. DAPONTE,
MARCELLUS L. COUNTRYMAN, JR.,
Attorneys for Petitioners.

St. Paul, Minn.,
November 12, 1946.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court, Western District of Wisconsin (R. 7-18) is reported in 64 F. Supp. 1. The opinion of the Circuit Court of Appeals for the 7th Circuit (R. 43-48) is reported in 156 F. (2d) 346.

JURISDICTION

The judgment of the District Court was entered February 21, 1946. (R. 36) The judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, was entered July 8, 1946. (R. 49) Petition for certiorari was filed in this Court on August 14, 1946, and was granted October 14, 1946. (R. 49)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

QUESTION PRESENTED

The question presented is whether any of the following described shipments were "military or naval property of the United States moving for military or naval and not for civil use", within the meaning of Section 321 (a), Title III, Part II, Transportation Act, 1940, 49 U. S. C. 65(a):

(a) Copper cable shipped in August 1941 for use in installing degaussing equipment (to neutralize magnetic mines) in a cargo vessel being constructed by Seattle-Tacoma Shipbuilding Corporation under contract with the Maritime Commission.

(b) Lumber shipped in January and February 1943 for use by contractors in construction of an ordnance plant for the manufacture of ammunition under contract with the War Department.

(c) Lumber shipped in May 1943 for use by Crown Iron Works in manufacturing members of pontoon bridges to

move military personnel across water barriers, under contract with the Marine Corps.

(d) Bowling Alley Outfits shipped in February 1942 to Siems-Drake, Puget Sound Company, Seattle, contractors, for installation in a recreation center being constructed under contract with the Navy, for use initially by civilian employees of the contractor, and later by military personnel, at Dutch Harbor, Alaska.

(e) Liquid paving asphalt shipped in January 1942 to Civil Aeronautics Administrator for use by a contractor in constructing runways in an airport at Cold Bay, Alaska, on land reserved by Executive Order for use by the Navy.

STATUTES INVOLVED

Northern Pacific Railroad Company, Petitioner's predecessor in interest, was organized by Act of Congress, July 2, 1864, 13 Stat. 365, and received a grant of lands in aid of construction by that Act, and an additional grant in aid of additional construction by Joint Resolution of May 31, 1870, 16 Stat. 378. (R. 20)

The Act and Joint Resolution imposed certain transportation obligations with respect to property and troops of the United States, which, by the Army Appropriation Act of June 7, 1924, (10 USC Sec. 1375), were fixed at not more than 50 percent of commercial or tariff rates. A history of land grant legislation may be found in *United States v. Union Pacific R. Co.*, 249 U. S. 354.

Section 321 (a) Transportation Act, 1940, modified the transportation obligations of land grant railroads by pro-

viding that full commercial rates shall be paid for transportation of any property for the United States, or on its behalf, "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty;" * * *. Section 321 (b) provides that if any railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of land from the United States to aid in the construction of any part of the railroad operated by it, reduced rates shall continue to apply as though subsection (a) had not been enacted, until such carrier shall file with the Secretary of the Interior a release of any claim it may have against the United States to additional lands or compensation for such lands. Section 322 provides for prompt payment of transportation bills as presented, without audit, and deduction of any over-payments found to have been made from amounts subsequently found due the carrier. Sections 321 and 322 are copied in Appendix "A", page 31.

STATEMENT

This action was brought under the Tucker Act, 28 USCA Sec. 41 (20) to recover a balance of freight charges on the five shipments above described. Bills were presented at tariff rates. The Government deducted the difference between the tariff rate and land grant rate from the original or subsequent freight bills, claiming that the shipments were military or naval property for miltary or naval use, entitled to land grant rates.

Stipulated facts were adopted by the District Court as Findings of Fact. (R. 18 et seq.)

Transportation Act, 1940, was enacted September 16, 1940. At that time there was pending in this Court, *United States v. Northern Pacific Railway Company,* decided December 16, 1940, 311 U. S. 317. That action was brought by the United States pursuant to the Act of Congress of June 25, 1929, (46 Stat. 41) expropriating all lands within the limits of the Northern Pacific grant which had been placed in forest reserves, directing the Attorney General to bring suit to adjust the grant, and providing for payment to the Railway Company of just compensation for expropriated lands to which it might be found entitled. In that suit the Company had been adjudged by the District Court to be entitled to patents for some 428,986 acres outside the limits of the forest reserves, of the estimated value of approximately $1,400,000; and to compensation for 1,453,061 acres of expropriated lands which it claimed in said suit to be of the value of $14,468,649. (Findings of Fact, R. 23) It was release of these claims to which Section 321 (b) has particular reference. This Court affirmed the decision of the District Court

that Petitioner was entitled to patents to the 428,986 acres outside the forest reserves and remanded the case for further proceedings respecting Petitioner's claims to compensation for expropriated lands. (R. 23)

Thereafter, in order to entitle itself to the benefit of Section 321 (a), Petitioner duly released, pursuant to Section 321 (b), its right to receive patents for the lands adjudged to it, and its claim for compensation for the expropriated lands, and judgment was entered accordingly in that suit. (R. 23)

Controversy having arisen as to the extent of the government's right to land grant rates under the exception contained in Section 321 (a), Petitioner brought this suit as a test case to obtain an authoritative determination of certain of the questions which had arisen.

The District Court held, (R. 17), that each of the above described shipments was military or naval property of the United States moving for military or naval and not for civil use within the meaning of Section 321 (a) and entered judgment dismissing this suit. The Court of Appeals for the Seventh Circuit affirmed. Its decision is summarized in the following quotation from its opinion:

> "Any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways, it was the kind of property Congress did not release from the low rates granted by the land grant railways." (R. 48)

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Seventh Circuit erred:

1. in holding that the United States was entitled to land grant rates on all or any of the shipments of government property above described;

2. in holding that each of said shipments was military or naval property within the meaning of the exception in said Sec. 321 (a) Transportation Act, 1940;

3. in holding that each of said shipments was moving for military or naval and not for civil use within the meaning of said exception; and in holding that "this exception was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress";

4. in holding that "any property the Government used to forward its total war effort was military or naval property, and * * * was the kind of property Congress did not release from the reduced rates granted by the land grant railways."

ARGUMENT

I

MATERIALS MOVING FOR USE IN CONSTRUCTION OF PLANTS FOR MANUFACTURE OF MILITARY OR NAVAL PROPERTY OR FOR USE IN THE MANUFACTURE OF SUCH PROPERTY, ARE NOT WITHIN THE FAIR MEANING OR INTENDMENT OF THE PHRASE, "MILITARY OR NAVAL PROPERTY MOVING FOR MILITARY OR NAVAL AND NOT FOR CIVIL USE."

Section 321 (a), Transportation Act, 1940, provides for payment of full commercial rates for transportation, for or on behalf of the government, of any property *except* "military or naval property * * * moving for military or naval and not for civil use." This language is restrictive. It is not of doubtful meaning. Fairly read, it means *articles for use by the armed forces.* It does not include articles moving for *construction or manufacture of facilities or articles ultimately for military or naval use.* Argument is not necessary to demonstrate what is self-evident.

Webster's New International Dictionary, 2nd Edition, unabridged, defines the words "military" and "naval" as follows:

> "Military"—"of or pertaining to soldiers, arms or war; belonging to, engaged in, or appropriate to the affairs of war; according to the methods and customs of war or armies";
>
> "Naval"—"of or pertaining to ships or shipping; of or pertaining to or connected with, possessing or characteristic of vessels of war or a navy".

Black's Law Dictionary, 2nd Edition, at page 778, defines "military" as "pertaining to war or to the army; concerned with war".

Copper wire, lumber, bowling alley outfits and liquid paving asphalt are not themselves military or naval articles. As such, they do not "pertain to soldiers, arms or war", nor do they "belong to the affairs of war." It is only such things as are furnished to the armed forces *for their use* that are military or naval property. *None of the shipments were so made or used.*

Manufacture and construction are civilian pursuits. From time immemorial, the armorer's trade has been a civil occupation. Materials, parts, ingredients, tools and machinery employed in production, manufacture or construction are devoted to civil uses. Such civil uses are not converted into military or naval uses by the fact that articles manufactured or produced thereby subsequently may be used for a military purpose.

The use made of *completed things* is obviously unrelated to the *processes involved in their construction or manufacture.* In the construction of a merchant ship, for example, the use made of materials, tools, machinery and men are the same whether the ship is intended for civil use or for military use. The use made of the *ship* is not a use *of the materials* composing it, for the materials are not a ship nor useable as such and the identity of the materials is merged in the ship. The machinery and tools were never any part of the ship.

Nor is the civil nature of the use made of materials and parts in construction or manufacture altered by the fact that the work is done under contract with the United States,

with materials procured and furnished to the contractor by the government. For the essential nature of the work must remain the same whether it is carried on by the government through civilian contractors or is wholly a matter of private enterprise.

The general understanding that the words "military or naval property", even if standing alone, would not be sufficient to cover things merely for use in the manufacture of arms and munitions is evidenced by an opinion rendered by Attorney General Palmer to the Secretary of State on March 3, 1920 (32 Op. 132), which has guided Congress in framing subsequent legislation. A Joint Resolution of Congress, approved March 14, 1912, and an Act of Congress, approved June 15, 1917, forbade the exportation of "arms and munitions of war" to any American country in which the President should proclaim that conditions of domestic violence existed. By Presidential Proclamation issued July 12, 1919, the existence of such conditions in Mexico was proclaimed and all persons were admonished to abstain from violation of the provisions of the Joint Resolution and Act of Congress thereby made applicable to Mexico. The question presented to Attorney General Palmer was whether those restrictions extended to machinery to be purchased in the United States and exported to Mexico for use in a factory there to be constructed and operated for the manufacture of arms and ammunition. In ruling that the Proclamation did not cover the exportation of such machinery, he said:

> "The nature of these provisions is such that they should be properly restricted to such articles as the ordinary signification of the terms used would cover. I do not think that machinery to be used in the construction of

a plant for the production of arms and munitions of war in Mexico would constitute an exportation of such arms and munitions within the fair construction of the language." (32 Op. 132, 134)

In much war legislation enacted contemporaneously with Transportation Act, 1940, Congress, being obviously guided by Attorney General Palmer's opinion, took pains to make express mention of "parts, ingredients, machinery, tools, materials, and supplies necessary for the production or manufacture of military or naval property" whenever it intended its legislation to cover such items. Thus, the Act of July 2, 1940, "to expedite the strengthening of the national defense", C. 508, Sec. 6, 54 Stat. 712, 714, provided that:

"Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, *or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof,* he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. * * *" (Italics ours)

By the Act of November 30, 1940, C. 926, 54 Stat. 1220, Congress amended the Anti-Sabotage Act of April 20, 1918, by adding at the end thereof certain additional sections including the following:

"Sec. 4. That the words 'national-defense material', as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description *and any part or ingredient thereof,* intended

for the use of the United States in connection with the national defense." (Italics ours)

Congress evidently doubted the sufficiency of the above definition of national defense material, for by the Act of August 21, 1941, C. 388, 55 Stat. 655, it amended the definition by adding thereto the following:

"or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof."

Again, in the Act of October 16, 1941, C. 445, 55 Stat. 742, Congress authorized the President to requisition for the defense of the United States the property specifically described in the following quotation upon his determination that:

"the use of any military or naval equipment, supplies, or munitions, *or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States.*" (Italics ours)

If the words "military or naval equipment, supplies or munitions" were not broad enough to authorize the President to requisition *parts, machinery, tools or materials necessary for their manufacture,* without express mention of the latter, how can it be supposed that Congress or the railroads considered the exception contained in Section 321 (a) of "military or naval property of the United States moving for military or naval and not for civil use" sufficient to cover such parts, machinery, tools or materials without similar

express mention thereof? If the words "military equipment or munitions" in the Act of July 2, 1940, were thought not sufficient to authorize the President to prohibit or curtail the exportation of "*parts, machinery, tools, material or supplies necessary for the manufacture, servicing or operation thereof*", without express mention, how can the phrase "military or naval property" be thought broad enough to include them? And if the words "national defense material", as broadly defined in the amendment to the Anti-Sabotage Act made by the Act of November 30, 1940, were not broad enough to include articles *for use in or in connection with the producing, manufacturing, etc., of articles intended for the use of the United States in connection with the national defense*, surely the language of the exception contained in Section 321 (a) is not broad enough for that purpose.

The position of the court below that, because war was imminent when Transportation Act of 1940 was passed, Congress must have intended "to save from the release of applicable land grant rates whatever of government property was shipped over land grant railways to be *used* by the United States in its military and naval security program", is as unfounded as it is illogical. If such an intention had existed, apt words, used in other contemporaneous legislation, were at hand to express it. The circumstance that war was imminent and that Congress was engaged in strengthening our defenses, instead of permitting an inference that such an intention existed, repels any such inference, because a desire under those circumstances to rgtain land grant rates for the shipment of *everything useful in connection with the producing, manufacturing or constructing of arti-*

cles and facilities for national defense would most certainly have led to express mention thereof.

Not only did Congress omit mention of "parts, machinery, tools, material or supplies necessary for the manufacture, servicing or operation" of military or naval property, but it deliberately restricted the phrase "military or naval property of the United States" by adding the words "moving for military or naval and not for civil use." If there be ambiguity in the phrase "military or naval property", it is dispelled by these further restrictive words. Any property moving for a civil, rather than a military or naval use is thereby withdrawn from eligibility for land grant rates. Since production, manufacture and construction carried on by civilian contractors and their civilian employees are obviously civil activities, machinery, tools, materials and supplies moving for use in such work are destined for civil use and, as such, *expressly excluded* from the exception, even if the broad sweep of the phrase "military or naval property", standing alone, might otherwise have been thought sufficient to include them.

It is, therefore, most significant that the qualifying words "moving for military or naval and not for civil use" were inserted as the result of compromise between the conflicting views of the House of Representatives, which desired complete repeal of land grant rates, and the Senate, which desired retention of land grant rates for military or naval property. The proposal to except military or naval property from repeal of land grant rates originated long before the war in an amendment reported by Senator Wheeler on April 20, 1938, to S 3876, 75th Cong., Third Sess. (Report No. 1791), which would have amended the bill by adding a

proviso: "that such applicable commercial rate shall not be paid for the transportation of men, officers or personnel in any branch of the military service and *military or naval property.*" When later the bill which became Transportation Act of 1940 (S 2009, 76th Cong., Third Sess.) was pending in Congress, it was amended in the House to include a provision that full commercial rates should be paid for transportation of persons or property for the United States or on its behalf, without exception. This provision was amended in conference by making exception of "military or naval property of the United States moving for military or naval and not for civil use or * * * members of the military or naval forces of the United States (or of property of such members) when such members are travelling on official duty" (House Report No. 2832, 76th Cong., Third Sess., Conference Report to accompany S 2009, pp. 60, 93). Thus, notwithstanding the imminence of war, *the wording of the exception was deliberately made more restrictive than had been proposed by Senator Wheeler back in* 1938.

We respectfully submit, therefore, that the plain meaning of the language used in the military property exception contained in Section 321 (a) confines the application of land grant rates to things shipped for immediate use by the armed forces and does not include materials, parts, ingredients, etc., shipped for use in the construction, manufacture or production thereof. The omission of Congress to include in the exception any mention of such materials and parts, while making express mention thereof in other contemporaneous war legislation, is conclusive evidence of the fact that Congress did not intend to make exception of such articles from the provision for payment of full applicable commercial rates.

II

THE SCOPE OF THE MILITARY PROPERTY EXCEPTION MAY NOT LEGITIMATELY BE EXPANDED BY CONSTRUCTION.

Unless there be ambiguity in the language of the exception, there is no room for construction. In our view, the language of the exception is not of doubtful meaning and is not susceptible of any construction which would encompass the shipments involved in this case. But, if the terms of the exception be deemed ambiguous, every rule of statutory construction forbids expanding its scope beyond what is embraced within the ordinary meaning of the language used.

First: Section 321 was, in the case of Petitioner and other railroads similarly situated, an offer of relinquishment of certain land grant rights of the government in return for releases of claims against the government. Subsection (b) withheld the benefits of Subsection (a) from railroads owning land-aided lines until they should file releases of any unsatisfied land grant claims they might have against the United States. Filing of the required releases constituted acceptance of the offer contained in Subsection (a) and resulted in a contract between the United States and the releasing carrier, amending and modifying its original land grant obligations. *United States v. Northern Pacific R. Co.*, 256 U. S. 51. Unlike the original land grant acts, there was nothing in the nature of a public grant involved in this offer of amendment of the land grant contract. But, even if the proffered relinquishment of the gov-

ernment's rights be viewed as in the nature of a public grant, it is well settled that the rule that public grants are to be construed against the grantee and in favor of the public does not deny to *public offers* a fair and reasonable interpretation or justify withholding that which it clearly appears the grant was intended to convey. See *Russell v. Sebastian*, 233 U. S. 195, 205, where the cases are collected.

Section 321 (a) clearly evidences the intention to give up the right to land grant rates for the transportation of all property except that specifically mentioned in the exception and should be construed accordingly.

Any other rule would make of Government offers traps for the unwary. Petitioner made a very considerable sacrifice in releasing its claims for compensation (aggregating approximately $14,468,649) for the expropriation of indemnity lands in forest reserves within the limits of its grant and in also releasing its claim to patents for other lands worth approximately $1,400,000 to which it had been adjudged entitled by the decision of this Court. In deciding to make this sacrifice, Petitioner had the right to believe that, if it did so, its liability for rate concessions upon the transportation of Government property would thereafter be limited to property falling within the fair meaning of the phrase "military or naval property moving for military or naval and not for civil use." Unless it can be said with assurance that Petitioner would not have made a different decision if Congress had written Section 321 (a) so as expressly to except from the provision for full tariff rates "property moving for military or naval use *or for use in or in connection with the producing, manufacturing or constructing of property for military or naval use and in time of war*

any property for use in forwarding the total war effort", the exception cannot fairly be so construed now. That this would have been a vastly different exception than the exception actually made of "military or naval property moving for military or naval and not for civil use" cannot be doubted. But it is an exact statement of the construction which the courts below have placed upon the latter phrase.

The fact that some land grant roads had no claims against the United States for additional lands or compensation for expropriated lands and hence gave up nothing by the filing of their releases cannot warrant treating Section 321 (a) as a bounty or as a grant without consideration for purposes of interpretation. Congress knew of Petitioner's claims, and the release requirements of Subsection (b) of Section 321 were incorporated in the Act for the very purpose of inducing their relinquishment. It was clearly the intention of Congress by this legislation to obtain, among other results deemed beneficial, the filing of releases considered to be of substantial value to the United States. The character of the legislation as constituting an offer resulting in a contract cannot be affected by the fact that releases made by some railroads were not of substantial value.

Second: The terms of the original land grant obligations extended to the transportation of "any property or troops of the United States." Section 321 (a), in effect, modifies these terms by substituting for the words "any property", the words "military or naval property moving for military or naval and not for civil use." The rule of construction applicable to the original terms must be equally applicable to the modified terms. In construing the terms of the original obligation, this Court said: "It might be very con-

venient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior and Mississippi Railroad Company v United States*, 93 U. S. 442, 454. Again, in holding that authorized mounts of army officers transported at government expense, pursuant to army regulations, were not "property of the United States" within the meaning of the land grant acts, this Court said: "The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction." *United States v Galveston, H. & S. A. R. Co.*, 279 U. S. 401, 404.

In *United States v Union Pacific R. Co.*, 249 U. S. 354, and again in *Southern Pacific Co. v United States*, 285 U. S. 240, this Court had occasion to pass upon the meaning and scope of the phrase "troops of the United States" as used in the land grant acts. In both cases, it gave to this phrase a restrictive meaning. In the *Union Pacific Case*, it held that the word "troops" had at the time of passage of the land grant legislation and had ever since had an established meaning, namely, "soldiers collectively—a body of soldiers", and hence did not include discharged military prisoners, discharged enlisted men, rejected applicants for enlistment, provisionally accepted applicants for enlistment, retired enlisted men or soldiers on furlough. In the *Southern Pacific Case*, it held that, while the test is whether the person to be transported is one of a collective body of soldiers, he must nevertheless, in order to qualify, be travelling for the performance of *a military function;* hence, engineer officers of the army assigned to non-military functions in con-

nection with rivers and harbors work were not "troops of the United States" within the meaning of the land grant acts.

The obvious purpose of Congress in enacting Section 321 (a) was to restrict the application of land grant rates upon property transported for the United States *in the same way that their application to persons transported for the United States had always been restricted.* It would be anomalous to apply a different rule of construction to the restricted provision thus made respecting government property than has always been applied to the restricted phrase "troops of the United States."

Third: It is a cardinal rule that an exception contained in a remedial statute will be strictly construed. *Piedmont & Northern Railway Company v Interstate Commerce Commission,* 286 U. S. 299; *McDonald v Thompson,* 305 U. S. 263; *Gregg Cartage & Storage Co. v. United States,* 316 U. S. 74; *Pennsylvania R. Co. v United States,* 54 F. Supp. 381. In the *Piedmont & Northern Case,* the Court had under consideration a provision contained in Sec. 1 (18), Transportation Act of 1920, excepting certain railroads from requirements of certificates of necessity for extending their lines. The Court said (p. 311-312):

> "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

Reference to the report of the House Committee on Interstate Commerce to accompany H. R. 4184, the bill subsequently enacted as Public Law 256, 79th Congress, approved

December 12, 1945, amending Section 321 by eliminating the exception of military and naval property (House Report No. 1408, 78th Cong. Second Sess.) and the debates in Congress on that bill will show that Section 321 was remedial legislation in the highest degree. In the debates in the House of Representatives on H. R. 4184 on May 23, 1944, 90 Cong. Rec. 4970, Congressman Boren said:

> "I should like to make it clear that the idea of repealing land-grant rates did not originate with the railroads. In other words, this is a shippers' bill. The great urge for the enactment of this measure comes from Government authorities having to do with the regulation of transportation and from the important shipping interests of the country."

The results to be achieved from the enactment of Section 321 (aside from obtaining desired releases of claims against the government) were obviously the same as those expected from the enactment of H. R. 4184. As shown by the Conclusion and Recommendation of the House Committee on Interstate and Foreign Commerce, in its report on H. R. 4184 (Appendix "B", infra p. 34), those results were: removal of discriminations under which industries labored in competing for sales to the government; assurance to shippers that the government would bear its fair share of the burden of maintaining adequate systems of transportation; elimination of the necessity for an inordinate amount of accounting and other clerical work in connection with computing the charges on government traffic; removal of the injustice of requiring land grant railroads to continue to make payments on a debt long since extinguished; removal from other carriers of the injustice of being compelled to reduce

their charges on government traffic in order to meet the competition of the land grant lines; and relief of the railroads from uncertainties as to their revenues so as to enable them to plan more intelligently to meet the uncertainties of the future. The main purposes of Section 321 were, of course, to remove discriminations in freight rates between suppliers of the government and to cause the government to assume for the benefit of shippers more nearly its fair share of the transportation burden.

It is not difficult to understand why the retention of land grant rates on military or naval property for military or naval use was not originally thought to interfere substantially with these ends. Competition in supplying the government with articles ready for immediate use by the armed forces could not have been thought extensive, because few are engaged in the manufacture of such articles. But competition between shippers for the furnishing of materials, parts and ingredients, as well as tools and machinery, for the production of facilities and articles ultimately for use by the armed forces could not have been considered inconsequential. When the purposes intended by Congress are thus kept in view, the conclusion that it intended its exception of military and naval traffic to be strictly limited is inescapable.

The holding of the court below that the exception includes "Any property the Government used to forward its total war effort" obviously nullifies in time of war the general provision of Section 321 (a) for payment of full commercial rates, since under conditions of modern warfare nearly all of the activities of the government in time of war are directed in some way to forwarding "the total war effort."

its holding is predicated on the startling and plainly erroneous proposition that *the exception* is to be *liberally* construed because "written for the benefit, not of the railroads, but of the United States." *This treats the exception as though it were the primary purpose of the legislation.* The purpose of the legislation, however, was manifestly *to relinquish rights theretofore possessed,* not to *obtain* rights. The fact that exception was made of certain rights raises no inference that more was intended to be saved than the language of the exception fairly imports. On the contrary, the purpose to make exception obviously called for clear specification of the traffic intended to be excepted.

We submit that the court below clearly erred in holding that the exception of military and naval property should be *liberally* construed to save from the release of applicable land grant rates whatever of government property was shipped over land grant railways to be used by the United States in its military and naval security program. It is *the general provision* for payment of full commercial rates, *not the exception,* that must be liberally construed, for it is the general provision which induced the release of Petitioner's claims and constituted remedial legislation.

III

NONE OF THE SHIPMENTS IN ISSUE WAS A SHIPMENT OF MILITARY OR NAVAL PROPERTY NOR WERE ANY OF THEM MOVING FOR MILITARY OR NAVAL USE.

Examination of the stipulated facts concerning the shipments here in issue, as found by the District Court (R. 24-35), will disclose the unreasonableness of the government's claim that each was a shipment of military or naval property moving for military or naval and not for civil use. In each case, the shipment was of ordinary civilian goods required by a civilian contractor in the performance of a contract to construct or manufacture and deliver a finished thing. Normally, such parts, materials and supplies would be purchased by the contractor and would move as ordinary commercial shipments at applicable tariff rates. No reason is apparent for the purchase and shipment of such parts, materials and supplies by the government except to obtain the benefit of land grant rates if available. Necessary allocations and priorities could be and were arranged to enable government contractors to procure necessary materials and supplies without necessitating the furnishing thereof by the government. It appears that, under the terms of the contract for construction of the Twin Cities Ordnance Plant at New Brighton, Minnesota, title to materials was to vest in the government "when designated by its Contracting Officer, and the Government reserved the right to furnish any materials necessary for the completion of the work" (R. 27). Presumably this was a standard provision of government con-

tracts made on a cost plus basis. The obvious purpose was to enable the government to purchase and ship materials on land grant rates where believed to be available. We turn now to the facts of the several shipments.

Copper Cable (R. 24-26). This shipment was made during the month of August, 1941, some four months before the United States was at war. It was for use by Seattle-Tacoma Shipbuilding Company in connection with the performance of a contract with the Maritime Commission entered into on October 9, 1939, for the construction of a single screw cargo vessel. The ordinary routine provided for by the Merchant Marine Act of 1936 made the plans and specifications for the construction of the ship subject to any changes that might be suggested by the Navy Department to make the vessel suitable for conversion into a military or naval auxiliary in time of war. The need for the copper cable resulted from a determination by the Navy Department in 1940 that the hull of the vessel should have degaussing equipment to neutralize magnetic mines. War was not then imminent, but obviously the use of magnetic mines by nations then at war suggested the advisability of installing degaussing equipment in the hulls of all vessels then under construction by the Maritime Commission. Such provision for protection of a merchant vessel was not more a military or naval measure than would have been the installation of similar protection against icebergs or other perils of the sea. The cargo ship in question was not then being constructed for military or naval use any more than any other vessel constructed in times of peace for the Maritime Commission. Moreover, it does not appear that the cargo ship in question (The S. S. Idaho) was ever used for military

or naval purposes. It was apparently sold by the Maritime Commission (to whom, does not appear) under a contract of sale providing that during the then existing emergency, it should be operated "to and from such port or ports and under such conditions as the Commission shall direct." It was delivered to the purchaser on September 8, 1941, three months before the war, and thereafter operated as directed by the Maritime Commission or War Shipping Administration, but to what service it was assigned is left to conjecture.

If the shipment of copper cable in question was military or naval property moving for military or naval and not for civil use, then any shipment of materials in time of peace for use in the construction of a merchant ship for the Maritime Commission must be equally so.

Lumber for Ordnance Plant (R. 26-29). This shipment moved in January and February, 1942, on commercial bills of lading which were substituted at destination for government bills of lading. The lumber was needed to enable civilian contractors to carry out a subcontract with the Federal Cartridge Corporation of Minneapolis, Minnesota, for the construction and completion of "several large manufacturing buildings with the necessary additional buildings, all of wood construction." The Federal Cartridge Corporation had a cost-plus-fixed-fee contract with the United States to build and operate a plant for the manufacture of ammunition for the armed forces on a site furnished and made available by the government. The Office, Chief of Engineers, issued allocations for the purchase of the needed lumber upon requisitions by the subcontractor who then "issued Purchase Orders to Vendors." The lumber was not

shipped for use by the armed forces nor was it used to make anything for the armed forces. It was moving for use and was used to construct an ordinary building for the government. The construction of that building was no more a military or naval use of the lumber than would be the construction of a building to house the War Department in Washington or the construction of a post office building. The operations carried on within the building after it was constructed were wholly unrelated to the use made of the lumber in the construction of the building.

Lumber for Construction of Pontoons (R. 29). This shipment was made in May, 1943, upon government bill of lading. The lumber shipped was required for performance of a contract between Crown Iron Works and the Marine Corps for the fabrication and furnishing of members of a certain type of demountable floating bridge. What type of contract this was does not appear. The finished balks, sills and chess manufactured by the Crown Iron Works were required by the Marine Corps to move military personnel and vehicles of war across water barriers and obviously were military or naval property moving for military or naval and not for civil use when shipped to the Marine Corps. The lumber, however, was not used or useable by the Marine Corps for military or naval operations. The Marine Corps did not manufacture the balks, sills and chess. The Crown Iron Works did that.

Bowling Alley Outfits (R. 30-32). This shipment moved in February, 1942, on government bill of lading. The bowling alley outfits were required by Siems-Drake Puget Sound Company, Seattle, Washington, for use in connection with the performance of a contract with the Navy for the con-

struction of naval air bases in Alaska. Under the contract, the contractor was permitted to construct "such commissary, recreational, and amusement facilities as may be approved by the Contracting Officer." On account of the unattractive working conditions at the site of these bases in Alaska, it was difficult for the contractor to keep civilian employees on the job. A recreation hall and theater was accordingly projected, with the approval of the Contracting Officer, to serve first as a recreation center for the contractor's men and afterward as a recreational center for military personnel occupying the station. The bowling alley outfits were procured, on the contractor's purchase order, for installation in the recreation center building. The primary purpose for which the shipment moved was to provide amusement facilities for civilian employees of the contractor. Had there been any purpose to provide them for the preservation of the morale of the armed forces to be stationed there, definite provision for the construction of those facilities would have been made in the contract instead of leaving the matter to the election of the contractor. The availability of the recreation facilities for the entertainment of military personnel afterward was clearly an incidental consequence of their construction and not the purpose for which the shipment moved. Bowling alley outfits are not military or naval property and those here in question were moving for use by civilian employees of the Siems-Drake Puget Sound Company, a civil use and not a military or naval use.

Liquid Paving Asphalt (R. 32-35). This shipment moved in January, 1942, on government bill of lading. It moved as an ordinary shipment for construction of a *public* airport by the Civil Aeronautics Administrator. At the time

it moved, a contractor was engaged in stripping and grading operations for the completion of an airport at Cold Bay, Alaska, on public lands reserved since 1929 for the use of the Navy Department, under the program carried on by the Civil Aeronautics Administration with funds appropriated by Congress for "the construction, improvement and repair of public airports and public landing areas in the United States and its territories and possessions, determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense". It happened that about four months after the shipment moved, the military situation required the Army to take over the construction of the airport at Cold Bay, and the asphalt was actually used by military personnel in constructing the necessary air strips. We submit, however, that the applicable rate cannot be varied by circumstances arising long after the transportation has been performed. The shipment in question moved for civil use by civilian contractors in the construction of a *public* airport. Neither the fact that the asphalt was actually laid by military personnel, due to circumstances subsequently arising, nor the fact that the airport was afterwards changed to a military airport can affect the Petitioner's right to full commercial rates for its transportation services.

CONCLUSION

For reasons hereinbefore stated, we respectfully submit that the judgment of the Circuit Court of Appeals for the 7th Circuit affirming the judgment of the District Court for the Western District of Wisconsin in so far as it dismissed Petitioner's claims arising out of the described shipments is erroneous and should be reversed.

Respectfully submitted,

LORENZO B. DAPONTE,
MARCELLUS L. COUNTRYMAN, JR.,
Attorneys for Petitioners.

APPENDIX "A"

TRANSPORTATION ACT, 1940

PART II—Rates on Government Traffic.

GOVERNMENT TO PAY FULL RATES

Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That Section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

DEDUCTION OF OVERPAYMENTS

Sec. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

APPENDIX "B"

Excerpt from House Report No. 1408, 78th Cong. 2d Sess. on Boren Bill— H. R. 4184.

"Conclusion and Recommendation."

"It is the conclusion of the committee that through the years the Government has gotten all and more than it bargained for in the original land-grant transaction. A statement issued by the General Land Office in 1941 summarized the situation by saying that in return for an 'empire of land' the Government got a transportation system that 'won the West and established a Nation stretching from the Atlantic to the Pacific Ocean.'

"Since that time, however, the Government has received as further and additional consideration on this deal land-grant deductions amounting to at least $500,000,000. The Committee is of the opinion that the time has come for the Government to close its books on this transaction.

"This conclusion is strengthened by the committee's examination of the actual working in practice of the land grant deduction system. It produces results inconsistent with our transportation policies. Businessmen must deal in the dark as to the rates paid by their competitors where Government contracts are involved, while there is discrimination in rates as among those shippers in position to take advantage of land-grant deductions and those not so situated.

"It is, therefore, the conclusion and recommendation of the committee that this bill to eliminate land-grant deductions should pass. Simple justice demands it; the public interest requires it.

"Among the desirable results to be expected from the enactment of the bill are the following:

"It will remove the discriminations under which industries now labor in competing for sales to the Government by placing them, so far as freight rates are concerned, in the same position with respect to such sales as they are with respect to transactions with private individuals and concerns.

"It will assure all shippers, agricultural and industrial, that their freight bills do not contain hidden taxes to make up for deficiencies in the charges paid by the Government on its traffic.

"It will result in relieving both the Government and the railroads of large expense by removing a source of unending controversy and litigation between them and by eliminating the necessity for an inordinate amount of accounting and other clerical work in connection with Government traffic.

"It will relieve the land-grant railroads of the injustice of being required to continue to make payments on a debt that was long since extinguished.

"It will relieve carriers that received none of the granted lands, including the motor carriers and water carriers as well as the great majority of the railroads, from the injustice of being compelled to reduce their charges on Government traffic in order to meet the competition of the land-grant lines.

"It will remove from the forwarders, which received no land grants, the threat of being required to submit to the land-grant deductions on Government traffic handled by them over land-grant lines.

"It will relieve the railroads of uncertainties as to their present revenues and thus enable them to plan more intelligently to meet the inevitable uncertainties of the future."

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No. 400

In the Supreme Court of the United States

OCTOBER TERM, 1946

NORTHERN PACIFIC RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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The decision of the court below involves the interpretation of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954 (49 U. S. C. 65 (a)) which entitles "military or naval property of the United States moving for military or naval and not for civil use" to land-grant railroad rates.

There are now pending in this Court two cases on writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, No. 56, *United States* v. *Legh R. Powell, Jr.* and *Henry W. Anderson, as receivers of the properties and assets of Seaboard Air Line Railway Company,*

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and No. 57, *United States* v. *Atlantic Coast Line Railroad Company,* also involving the same provision of Section 321 (a) of the Transportation Act of 1940. In Nos. 56 and 57, the Government property in question was phosphates lend-leased in 1941 to Great Britain for use there as farm fertilizer. In the instant case, as the petition for a writ of certiorari indicates, there are involved five separate shipments not connected with lend-lease aid: copper cable for degaussing equipment for Maritime Commission cargo vessels; lumber for construction of a War Department ammunition plant; lumber for Marine Corps military bridges; bowling alley equipment for recreation of civilian personnel erecting a naval base at Dutch Harbor, Alaska, and later for military personnel stationed there; and liquid paving asphalt for the construction of runways at a Civil Aeronautics Administration airport at Cold Bay, Alaska, to be used by naval planes in the defense of the territory.

While we regard the decision of the court below in the instant case as correct, we believe that the case presents an appropriate complement to Nos. 56 and 57, which affords the Court an occasion to resolve, at this Term, practically all of the currently disputed issues as to the proper interpretation of Section 321 (a). Accordingly, we do not oppose the granting of the writ, and we

request that, if the writ issues, the case be set down for argument immediately after Nos. 56 and 57.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

SEPTEMBER 1946.

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 7–18) is reported in 64 F. Supp. 1. The opinion of the Circuit Court of Appeals (R. 43–48) is reported in 156 F. 2d 346.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 8, 1946 (R. 49). The petition for a writ of certiorari was filed on August 14, 1946, and was granted on October 14, 1946 (R. 49). The jurisdiction of this Court rests upon Section

240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the following items of Government-owned property, shipped on Government bills of lading over petitioner's railroad in 1941, 1942, and 1943, constituted "military or naval property of the United States moving for military or naval and not for civil use" within Section 321 (a) of the Transportation Act of 1940, and were therefore entitled to move at land-grant reduced rates:

(a) copper cable paid for by the Navy Department and shipped for construction of Navy specified degaussing equipment (to neutralize magnetic mines) for a Maritime Commission cargo vessel.

(b) lumber for construction of a War Department owned ammunition plant.

(c) lumber for construction of Marine Corps military bridges.

(d) bowling alley equipment intended for recreation of civilian personnel erecting a naval base at Dutch Harbor, Alaska, and later for military and naval personnel stationed there, and actually used only by military and naval personnel.

(e) liquid paving asphalt for the construction of runways at a Civil Aeronautics Administration airport at Cold Bay, Alaska, intended to be used and actually used by military and naval planes in the defense of the territory against Japanese attack.

STATUTE INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. 65 (a), are set forth in the Appendix, pp. 48–50.

STATEMENT

The parties entered into a stipulation of facts which was adopted by the District Court as its findings of fact (R. 8, 18, 43). The agreed facts are as follows:

The shipments in controversy, five in number, were transported over petitioner's railroad on Government bills of ladings in 1941, 1942, and 1943, and were admittedly Government property at the time of carriage (Pet. 7). Petitioner, denying that the property consisted of "military or naval property * * * moving for military or naval and not for civil use," submitted its bills to the Government at the published commercial tariff rates (R. 19). However, the United States claimed that each shipment was entitled to move at land-grant rates, under Section 321 (a) of the Transportation Act of 1940, and in each case deducted the difference between the commercial rates and the reduced land-grant rates, in some instances from payments of the original bills and, in others, from payment of subsequent bills (as Section 322 of the Transportation Act, Appendix pp. 49–50, expressly permits) (R. 19–20). Petitioner thereupon brought this action under the Tucker Act to

recover the deducted sums (R. 19). The amount claimed on these disputed shipments was $3,569.75 (R. 8, 18, 45).[1]

Petitioner's predecessor was granted public lands on condition that its road "shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation." Section 11, Act of July 2, 1864, 13 Stat. 365, 370, c. 217, 38th Cong., 1st Sess. (R. 21).[2] The Army Appropriation Act of June 7, 1924, 43 Stat. 477, 486, 10 U. S. C. 1375, provided that land-grant rates shall be "such rates as the Secretary of War shall deem just and reasonable and shall not ex-

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[1] Petitioner initially brought suit on seven separate shipments for which it had been paid land-grant rates. In the course of the hearing in the District Court, petitioner withdrew one of these claims (R. 2, 8, 17, 22), and the Government admitted liability for the full commercial tariff on another claim (R. 1–2, 8, 17, 23).

[2] Section 20 of the Act of July 2, 1864, 13 Stat. 365, 372, provided as follows:

"That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

ceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large" (R. 22). Section 321 of the Transportation Act of 1940, *infra*, pp. 48–49, provided that henceforth the "full applicable commercial rates, fares, or charges" should be paid for carriage of all Government goods except for the "transportation of military or naval property of the United States moving for military or naval and not for civil use," upon condition that the land-grant railroads should file releases with the Secretary of the Interior of any claims against the United States to additional unpatented lands or compensation therefor (R. 22). Petitioner, and the other carriers concerned, duly filed the required releases under Section 321 (b), prior to the performance of the transportation services in question, and petitioner's releases were approved by the Secretary of the Interior on April 16, 1941 (R. 22–23).[3]

[3] At that time, the petitioner and the Government were engaged in litigation concerning petitioner's claims to public lands under its original land-grant acts. By the decision of this Court in *United States* v. *Northern Pacific Railway Company*, 311 U. S. 317, decided December 16, 1940, it was adjudged that the petitioner was entitled to patents to 428,986.68 acres, carried in the petitioner's inventory at a value of approximately $1,400,000. The petitioner's claim for compensation for expropriated lands, amounting to a total of 1,453,061.02 acres claimed by petitioner to be worth $14,468,649.06, was remanded by this Court to the District Court for the trial of various issues going to the quantum of

The pertinent facts concerning the five shipments involved in this case are as follows:

1. *Copper cable for degaussing equipment.*—In August 1941, an inspector of naval material consigned 15,780 pounds of insulated copper cable from Pawtucket, Rhode Island, to the District Material Officer, Thirteenth Naval District, c/o Seattle-Tacoma Shipbuilding Company. This cable was furnished and transported by petitioner for the Navy for use in the installation of degaussing equipment (to neutralize magnetic mines) on Hull No. 123, a cargo vessel being built by the Shipbuilding Company under contract with the Maritime Commission, entered into on October 9, 1939. Pursuant to Section 501 (b) of the Merchant Marine Act of 1936, as amended (46 U. S. C. 1151 (b)), the plans and specifications for the vessel had been submitted to the Navy Department for suggested changes making it suitable for conversion into a military or naval auxiliary or for use by the United States in time of war. In 1940,

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the award, the value of the land, and the Government's claim for damages for breach of agreement by the railroad. In its release under Section 321 (b), petitioner included all of its claims, except that portion of the 428,986.68 acres previously sold by it to bona fide purchasers. The parties to that suit thereupon stipulated for settlement of the controversy by mutual relinquishment of all claims, and payment by the petitioner of $300,000 to the United States. On the basis of this stipulation, the District Court entered a decree dismissing the suit. R. 23; *United States* v. *Northern Pac. Ry. Co.*, 41 F. Supp. 273 (E. D. Wash.); S. Doc. No. 48, 77th Cong., 1st Sess. (reprinted in 41 F. Supp. at 284).

while the ship was under construction, the Navy Department and the Maritime Commission agreed that all Maritime Commission ships should have degaussing equipment. The degaussing specifications were to be prepared by the Navy, which was also to furnish all equipment and bear its cost and the cost of transportation. During installation, the Navy Department would act in an advisory capacity. The Maritime Commission was to make all necessary arrangements with its contractor. In accordance with this general plan, the degaussing equipment for Hull No. 123, including the copper cable in question, was furnished and paid for by the Navy. The Navy also paid for the transportation of all equipment.

The Maritime Commission contract for the sale of the ship provided that during the emergency declared on September 8, 1939, the vessel was to operate as directed by the Maritime Commission; and from the time of its delivery in September 1941, it was operated as directed by the Maritime Commission or the War Shipping Administration (R. 8–10, 24–25, 43–44).

2. *Lumber for construction of munitions plant.*— In January and February 1942, petitioner transported from the State of Washington to New Brighton, Minnesota, seven carloads of lumber, shipped by various lumber companies, consigned to the U. S. Area Engineer, Twin Cities Ordnance Plant, in care of Foley Brothers, Inc. and Wal-

bridge, Aldinger Company, for use by these contractors in the construction of Twin Cities Ordnance Plant. This Plant was a Government-owned, War Department sponsored, factory for the manufacture of .30 and .50 caliber ammunition. It was to be operated on behalf of the Government, by Federal Cartridge Corporation, with whom the War Department, in July 1941, had entered into a cost-plus-fixed-fee construction and operation contract. Foley Bros. and Walbridge, Aldinger Company, as a joint venture, were subcontractors for construction. The Government furnished the site, was at all times the owner of the entire facility, and supervised all construction through the Army's Quartermaster Corps and the Corps of Engineers. The Office, Chief of Engineers, acted as a central procuring agency for lumber used in the construction of the Plant and issued allocations for the purchase of the lumber here involved. After completion in January 1943, the Plant was engaged in manufacturing small caliber ammunition for the use of the armed forces of the United States (R. 11–13, 26–28, 44).

3. *Lumber for construction of Marine Corps pontons.*—In May 1943, petitioner carried 113,120 pounds of fir lumber shipped by a lumber company from the state of Washington to Minnesota, consigned to Depot Quartermaster Aaron Carlson, care Crown Iron Works, at Minneapolis, Minnesota, for United States Marine Corps. The lumber was to

be treated, kiln dried, milled, and manufactured, at the Crown Iron Works, into trestle balks and ponton balks, sills, and chess, all of which are necessary parts of certain types of demountable floating bridges required to move military personnel and war vehicles across water barriers. The balks manufactured from the fir lumber involved here were either shipped overseas in connection with military or naval operations, or were used in the construction of bridges or piers, at Marine Corps camps, for the training of combat engineers (R. 13–14, 29, 44).

4. *Bowling alleys for Dutch Harbor.*—In February 1942, an Inspector of Naval Material shipped, over petitioner's and connecting carriers' roads, 29,037 pounds of bowling alley equipment from Michigan, to Seattle, Washington, consigned to the Officer in Charge, Siems-Drake Puget Sound Company, for reshipment to Naval Air Base, Dutch Harbor, Alaska, Contract NOy 3570. That contract originally covered the construction of Naval Air Bases at Kodiak and Sitka, Alaska, and was later supplemented to include, among other places, a naval air base at Dutch Harbor. The contractor, Siems-Drake Puget Sound Company, as a joint venture of three established construction contractors, was organized for the sole purpose of performing this work. All the land on which the Dutch Harbor air base was constructed was public land reserved for Navy use,

and after October 1941 the entire area was a military reservation from which all nonmilitary personnel and activities were excluded. Construction was at all times under control of the naval Resident Officer in charge.

The construction contract provided that only such recreational and amusement facilities as the Contracting Officer approved should be installed. The purchase and installation of the bowling alleys were approved, as an appropriate means of expediting completion of this essential air base by reducing the inordinately high labor turnover which resulted, in part, from boredom in off-hours. As an economy measure eliminating duplication, the recreational building, in which the alleys were to be installed, was originally intended to serve first as a recreation center for the contractor's workmen, and then as a center for the military personnel stationed at the base. Actually, all civilian workmen were evacuated from the station in December 1942, the construction work was taken over by the Seabees, and these recreational facilities, including the bowling alleys, were used only by military personnel and never by civilians (R. 14–18, 30–31, 45).

5. *Liquid paving asphalt for Cold Bay, Alaska, airport.*—In January 1942, petitioner (and a connecting carrier) transported from Richmond, California to Seattle, Washington, 1259 barrels of liquid paving asphalt, shipped by the Standard Oil

Company of California, consigned to the Civil Aeronautics Administration, Alaska Project Warehouse, Seattle, for export. The asphalt was for use in constructing runways at an airport at Cold Bay, Alaska, under the Civil Aeronautics Administration's program for "Development of Landing Areas for National Defense." This program grew out of several appropriations by the 76th and 77th Congresses for the construction of public airports and landing areas "determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense * * *." The Cold Bay airport had been designated in this manner. In the winter of 1941–42 the Army's Alaska Defense Command considered Cold Bay its most important field and urged its speedy completion; on December 15, 1941, General Buckner, Commanding General of the Alaska Defense Command, advised the Civil Aeronautics Administration that the field at Cold Bay was "vital to the immediate defense of key points in Alaska" and he listed it as first in priority in construction of Alaskan airfields. Work began with a civilian contractor, but after one of the runways had been graded the War Department commenced the second runway with troop labor. Late in May, 1942, the Army took over the entire project from the contractor, took possession of the asphalt, expanded the runway

length, and finished the job. Thereafter, the War Department was in full control of the field which became known as Fort Randall. The land on which the field was constructed was public land reserved for the use of the Navy by a 1929 executive order. At the time of the Japanese invasion of the Aleutians, the Cold Bay field played an important part in the defense of Alaska. The unexpected appearance of bombers based at Cold Bay turned back the Japanese attack on Dutch Harbor in the Spring of 1942 (R. 18–21, 32–34, 45).

The District Court held that each of these five shipments was "military or naval property of the United States moving for military or naval and not for civil use," and entitled to land grant rates under Section 321 (a) of the Transportation Act of 1940 (R. 36). Judgment was entered for petitioner in the sum of $319.33 on another claim which the Government did not contest (R. 17–18, 23–24, 36). See footnote 1, *supra*, p. 4. On appeal of petitioner, the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment (R. 49).

SUMMARY OF ARGUMENT

This case involves the application of land-grant railroad rates, under Section 321 (a) of the Transportation Act of 1940, to five shipments of Government property over petitioner's road. Petitioner contends that only property intended for

direct use by military or naval personnel is entitled to reduced rates under Section 321 (a), and that these shipments are therefore excluded. The Government submits that each of these shipments constituted "military or naval property of the United States moving for military or naval and not for civil use," and both lower courts so held. Acceptance of the Government's contention in the companion cases of *United States* v. *Powell, et al.* and *United States* v. *Atlantic Coast Line Railroad Company*, Nos. 56 and 57, would also dispose of this case, but there are narrower grounds for affirming the present judgment. This brief emphasizes these narrower grounds.

1. At the very least, all War and Navy Department property, and Government property shipped at the request of the armed services, is entitled to reduced rates. Historically, all army and navy property, of all types and for all purposes, has been designated as military or naval property or supplies, and there is no justification in the history or terms of Section 321 (a) for shrinking that conventional usage. The statutory exception contained in the words "and not for civil use" merely serves to exclude property moving in connection with the traditional civil functions of the War and Navy Departments, such as the improvement of rivers and harbors, or disaster relief. Here, all property

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moved solely for normal defense purposes; four of the shipments (copper cable, both lots of lumber, bowling alleys) were War and Navy Department property; the asphalt was shipped by the Civil Aeronautics Administration, which was undertaking to construct a military airfield on the Army's behalf and at its request.

2. An additional ground for affirmance is that each of these five shipments clearly moved for a use directly related to preparation for actual combat or to combat itself, and the sphere of combat certainly represents the very core of that which is meant by "military." In two instances (copper cable, lumber), the property was immediately to be used for the production or installation of arms or weapons (degaussing equipment, demountable military bridges); in one case (asphalt), the shipment was for the construction of the essential portion, i. e., the runway, of a combat installation (an airfield); in another (lumber), for the construction of a Government war plant producing a weapon (ammunition); in the fifth (bowling alleys), to sustain the morale of naval personnel stationed at a combat installation and of war workers erecting that airfield for the Navy.

3. Section 321 (a) must be liberally construed to promote the national defense and the prosecution of the war. As the Government has shown in its brief in Nos. 56 and 57, the legislative his-

tory and the historical background of the 1940 statute indicate that Congress intended to do no more than relieve the railroads of their recently enlarged burden of carrying relief and emergency shipments, without hampering the transportation of war or defense materials which were then beginning to move in increasingly significant amounts. Added to the force of this legislative background is the weight of the established rule that grants of public rights and relinquishments of public interests are to be construed liberally in favor of the Government and strictly against the donee.

ARGUMENT

Like *United States* v. *Powell, et al.*, and *United States* v. *Atlantic Coast Line Railroad Company*, Nos. 56 and 57, this Term, this case involves the interpretation of the provision of Section 321 (a) of the Transportation Act of 1940 which entitles "military or naval property of the United States moving for military or naval and not for civil use" to land-grant railroad rates. In Nos. 56 and 57, the government property in question was phosphates lend-leased in 1941 to Great Britain. This case concerns five shipments connected not with lend-lease aid to Allied nations but with the supply of our own armed forces: copper cables for degaussing equipment for Maritime Commission cargo vessels; lumber for construction of a War Department ammunition plant; lumber for

Marine Corps military bridges; bowling alley equipment for recreation of civilian personnel erecting a military air base at Dutch Harbor, Alaska, and later for military personnel stationed there; and liquid paving asphalt for the construction of runways at a Civil Aeronautics Administration airport at Cold Bay, Alaska, to be used by military and naval planes in the defense of the territory.

Petitioner's basic contention is that land-grant rates are available under Section 321 (a) only to articles shipped to or for direct use by military or naval personnel, and not to shipments of construction materials, tools, machinery, or other property for use of contractors, or their employees, in manufacturing articles to be used directly by military or naval personnel (Br. 8–15). It is argued that manufacturing is a civil, not a military or naval activity, and that it is immaterial that the manufactured product may admittedly be military property, since the ingredients and materials used in the manufacture of military property completely lose their identity in the completed article. In other words, petitioner equates "military or naval property" with the finished article being transported for use by a soldier, sailor, or marine.

In this case, as in Nos. 56 and 57, the Government contends that all its property, moving directly in support of the national defense, is entitled to move at reduced rates under Section 321.

(a). We reiterate the general argument made in the two lend-lease cases. Acceptance of that contention would dispose of this case as well. But there are narrower grounds for holding that the present shipments are eligible for land-grant rates, and in this brief we shall emphasize those points. Here, four of the shipments were made, in the course of defense preparations or the actual waging of war, by the armed services—War Department, Navy Department, Marine Corps—and the fifth was a war shipment made by the Civil Aeronautics Administration at the express urging of the War Department. In the four cases involving raw materials or semi-processed parts (copper cable, lumber, asphalt), the property transported by petitioner was directly concerned with the manufacture of combat equipment or installations (degaussing equipment, ammunition, military bridges, airfield); the fifth shipment, of a finished product (bowling outfits), was intended to maintain the morale, first of civilian workmen erecting a wartime military post in remote Alaska, and then of soldiers and sailors to be stationed there. So close and immediate a relation to the military defense or to the military prosecution of the war is in itself a sufficient basis for concluding that the shipments were military or naval property, and that they moved for a military or naval and not for a civil use.

I

WAR OR NAVY DEPARTMENT PROPERTY, AND GOVERNMENT PROPERTY SHIPPED AT THE REQUEST OF THE WAR OR NAVY DEPARTMENTS, IS ENTITLED TO LAND-GRANT RATES

1. We argue, in Nos. 56 and 57 (Brief for the United States, pp. 91–94), that the exception for "military or naval property" does not apply *only* to property shipped by or under the control of the War and Navy Departments. But that qualification, while not necessary, should certainly be sufficient. At the very least, the adjectives "military" and "naval" characterize the national defense activities of the armed services and of the two cabinet departments charged with the main responsibility for the preparation of defense and the conduct of hostilities. Whatever else these terms may encompass, their narrowest traditional definition covers all supplies procured by the armed services. War Department practice has long referred to all of its purchases, of pencils as well as of rifles, as "military supplies." See Military Laws of the United States, 8th Ed., 1939, and Supp. III, 1939–1944, Secs. 1928–1941, 2014–2033.[4] During the war, War Department policy, requir-

[4] The War and Navy Departments, of course, purchase many "civilian type" goods, raw materials, etc. Especially in wartime, vast quantities of materials, indistinguishable in character from those used by the general populace, are bought for the official use of the Army and the Navy and the personal use of its members and of the civilians accompanying them. Purchases for Quartermaster stores and commis-

ing advantage to be taken of land-grant rates in purchasing, made no distinction whatever between "civilian type" goods, actual "munitions," processed parts, or raw materials. The Quartermaster Corps (which purchases clothing, bedding, food, and miscellaneous supplies) applied the same rule as the Ordnance Department (procuring ammunition, tanks, automotive vehicles) and the Corps of Engineers (charged with the construction of government-owned camps and industrial facilities). See War Department Procurement Regulations No. 11, par. 118c, 10 Fed. Reg. Sec. 811.1182c (August 25, 1945, p. 10671). And it is clear that when the War Department proposed to Congress, in 1938, that "military or naval property" continue to be transported at reduced rates, it at least intended to cover all of its own supplies and those of the Navy Department. Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 10620, pp. 16–17.

2. There is no historical warrant for limiting this conventional practice, as petitioner would do, to include only articles actually used by military or naval personnel. Neither the traditional usage

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saries are but a familiar aspect of this practice. Construction materials and equipment are also procured in large quantities for industrial plants, facilities, and posts; all kinds of materials, parts, and machinery are purchased for cost-plus-fixed-fee supply contracts, for furnishing to fixed price contractors, or for use by government-operated plants or arsenals.

of the armed services nor common acceptance supports such a limitation. Weapons or combat tools to be used by servicemen have been called weapons, arms, ammunition, or implements of war; other property physically used or handled by soldiers or sailors (including clothing, food, cots, tents, typewriters, medicines, mosquito netting, plumbing)[5] has not been separated, in statute or departmental practice or current usage, from the general mass of supplies of all kinds procured by the military and naval establishments. And in the light of the Congressional purpose to forward the national defense, there is no justification for creating an artificially narrow conception of "military or naval property" for the single purpose of determining land-grant rate reductions.

3. Nor is the requirement that reduced rates apply to military or naval property "moving for military or naval and not for civil use" reason for limiting coverage to War or Navy Department property used in its present form by military or naval personnel. The narrow answer to this contention is that if it be granted, as we have argued, that "military or naval property" includes, as a minimum, all War and Navy Department supplies (*supra*, pp. 18–20), it can hardly be said that the

[5] In the District Court, petitioner voluntarily dismissed its claim involving plumbing fixtures on the ground that naval personnel were to use them (R. 2, 32). See *supra*, p. 4.

adjectives "military" and "naval" suddenly take on a highly restricted meaning in the succeeding phrase when they modify the noun "use" rather than "property." Assuming that "moving for military or naval and not for civil use" is not solely a legislative definition of "military or naval property," the only construction of these qualifying words which harmonizes with use of the single word "military" is to read the phrase as excluding coverage of War and Navy Department property concerned with the so-called civil responsibilities of those departments, such as the improvement of rivers and harbors, or the government of island territories.[6]

More broadly, we have maintained in our brief in Nos. 56 and 57, pp. 83–87, and as the court below clearly stated (R. 47), the words "moving for military or naval and not for civil use" confirm Congress' intention that the use or purpose to which the property is to be put is the controlling test of its military or naval character. Military property is property which is moving for military and not a civil use. Military or civil use is determined not by the status of the person who will

[6] On this construction, strict limitation of the coverage of Section 321 (a) to War and Navy Department property would suffice to uphold land-grant rates in the instant case, but not in Nos. 56 and 57. In its brief in that case, pp. 91–94, the Government has set forth the reasons why we believe that Section 321 (a) was not intended to restrict land-grant rates to War and Navy Department property.

touch or handle or consume the goods; nor by the type of activity in which the property is immediately to be used (e. g., manufacturing), but by the relation of the shipment to the military aim of the preparation of national defense, or the prosecution of the war. Property moving for a dominantly civil use, such as the War Department's normal civil functions of improving navigation of rivers and harbors, must pay full rates even though destined for handling by soldiers. Cf. *Southern Pacific Co.* v. *United States,* 285 U. S. 240. Conversely, supplies being transported by the service departments in performance of their military functions are entitled to reduced rates even though the persons immediately handling the goods are civilian war workers or technicians. For instance, the use of Army stores to provide sustenance for civilian technicians repairing planes at a China air base cannot be held to be a "civil" as opposed to a "military" use. See *infra,* pp. 40–41.

Likewise, the type of activity occurring at the next stage in the history of the property being transported is no index of the use for which it is moving. The next stage may be manufacture, storage, further transportation, consumption, testing, reconditioning, or repair, but the overriding purpose of all stages in the handling of the material is either the promotion of national defense or the prosecution of the war, on the one hand, or the advancement of a recognized non-

defense "civil" activity on the other. In the context of Section 321 (a), no phase or stage can be said to have an essential character of its own, as civil or military, apart from the dominating purpose for which it is carried on. Petitioner would hardly deny, for example, that a tank returned from a theatre of operations and being transported to a factory for repair or reconditioning before reshipment overseas was moving for military and not for civil use.[7]

4. It is also plain that "military or naval property moving for military or naval and not for civil use" is not restricted to "arms," "munitions of war," or "weapons." In the basic land-grant Act of July 16, 1892, 27 Stat. 174, 180 (see Brief for the United States, Nos. 56 and 57, pp. 54, 88–91), and the succeeding Army appropriations acts for over 30 years, Congress consistently referred

[7] In *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605, 608 (N. D. Calif.), the court held benzol shipped for use in the manufacture of aviation gasoline for the armed forces to be entitled to land-grant rates, saying:

"That the benzol had to be processed and other component material added does not, as contended, detract from its status as military property at the time of transportation. To fix its status according to the standards proposed by plaintiff would involve refinements of evaluation too speculative and too far removed from realities. At what point would its 'military use' become an actuality? When the first drop was mixed with added material? When the manufacturing process was completed? When the first drum of gasoline or first tire started on their way? When the gasoline was syphoned into an airplane tank? Or perhaps not until the airplane had entered upon the performance of its mission?"

to "transportation of troops and *munitions of war and military supplies and property,*"* thus making it clear that, in the terminology Congress has used when legislating in this field, "military property" can and does include materials other than "munitions of war." Several other statutes have carefully used "munitions" or "arms" when Congress has sought to cover only that limited category of military property. The Joint Resolution of March 14, 1912, 37 Stat. 630, prohibited the export of "any arms or munitions of war" to countries in which there was domestic violence. The Neutrality Acts of 1935, 1937, and 1939 all dealt with the exportation of "arms, ammunition, or implements of war" to belligerent countries. Jt. Res. of August 31, 1935, c. 837, 74th Cong., 1st Sess., 49 Stat. 1081; Jt. Res. of May 1, 1937, c. 146, 75th Cong., 1st Sess., 50 Stat. 121; Jt. Res. of November 4, 1939, c. 2, 76th Cong., 2d Sess., 54 Stat. 4. The Act of June 25, 1940, c. 427, 76th Cong., 3d Sess., 54 Stat. 572, 573–574, authorized the Reconstruction Finance Corporation to "purchase and produce equipment, supplies, and machinery, for the manufacture of *arms, ammunition, and implements of war.*" It is only by ignoring the patent difference between the breadth of "military or naval property" and the limited scope of "arms" or "munitions" that petitioner can find any support in an opinion of Attorney

* Italics are supplied in all quotations, unless otherwise expressly indicated

General Palmer, under the 1912 resolution, that an embargo on arms and munitions did not cover machinery for the production of those articles. 32 Op. Atty. Gen. 132 (1920).* Moreover, as the opinions of the Attorney General indicate, these neutrality resolutions must be interpreted to fulfill their purpose, unrelated to the present case, of preventing embroilment in foreign strife without unduly destroying American trade. See 29 Op. Atty. Gen. 375; 30 Op. Atty. Gen. 213, 227; 32 Op. Atty. Gen. 132.

5. Petitioner also cites the detailed wording of the Anti-Sabotage Act, the Embargo Act of July 2, 1940, and the Property Requisitioning Act of October 16, 1941, as demonstrating that Congress intended to use the terms "military or naval property of the United States moving for military or naval and not for civil use" very narrowly. On the contrary, as we point out in Nos. 56 and 57 (Brief for the United States, pp. 67–70, 73, 102–103), the statutes reveal the breadth of Congressional concern with the promotion of national defense, and the more elaborate wordings follow solely from the different purposes and terms of those acts. In amending the Anti-Sabotage Act of 1918, 40 Stat. 533, by the Act of August 21, 1941, 55 Stat. 655, to cover injury to "national-

*Attorney General Palmer stated: "I do not think that machinery to be used in the construction of a plant for the production of arms and munitions of war in Mexico would constitute an exportation of such arms and munitions within the fair construction of the language." 32 Op. Atty. Gen. 132, 134.

defense material," Congress properly saw fit, in a criminal statute, legislatively to define the term "national-defense material," 50 U. S. C., Supp. V, 104, with great particularity. That the land-grant clause of Section 321 (a) has no such detailed legislative definition hardly proves that Congress intended "military or naval property" to exclude the types of property specifically defined as within the concept of "national-defense material." The inference is rather the other way.

The Embargo Act of July 2, 1940, 54 Stat. 712, 50 U. S. C., App., 701, authorized curtailment of exportation of "military *equipment*" or "*munitions*" or "component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof." In addition to the use of the restricted terms "military *equipment*" and "*munitions*," rather than "military *property*" (see *supra*, pp. 23–25), the Embargo Act is distinguished from Section 321 (a) by the fact that it was concerned with possible use of private property for national defense purposes rather than with the owner's present or intended use of the property, while Section 321 (a) deals solely with Government property actually intended by the Government for a particular, i. e., military, purpose. These differences in terminology, and in the ownership and present use of the property, are sufficient reasons for more specific elaboration of the types of property subject to embargo. Similar reasons apply to the equivalent language of the

Property Requisitioning Act of October 16, 1941, 55 Stat. 742, authorizing requisition of any "military or naval *equipment, supplies,* or *munitions,* or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions." We have pointed out, in our brief in Nos. 56 and 57, pp. 102–103, how liberally Congress viewed even the restricted term "military or naval equipment," as it appears in that statute.

Little aid in construction can be derived from a meticulous, word-by-word comparison of the language of the several national defense acts of 1940 and 1941, without reference to their varying purposes and particular legislative histories. The hazards of drafting largely determined the particular words transplanted from one act to another, or inserted here rather than there. In those days Congress was not too concerned with careful choice of phraseology, but with speedily implementing the attainment of proper levels of preparedness.[16] The significant key is provided

[16] For instance, though the Embargo Act of July 2, 1940, refers only to "*military* equipment" while the Property Requisitioning Act of October 16, 1941, deals with "military or *naval* equipment," Congress can hardly have intended to exclude naval equipment from coverage by the 1940 statute. In fact, the Act of October 10, 1940, 54 Stat. 1090, 50 U. S. C., App. 711, authorizing requisition of equipment or materials embargoed under the Act of July 2, 1940, refers to "military *or* naval equipment * * * the exportation of which has been denied in accordance with the provisions of section 6 of the Act approved July 2, 1940 * * *."

not by the literal language of each statute but by this general aim; of promoting the national defense, which bound and infused the most important legislation of that period.

6. It remains only to point out that four of the shipments involved here (copper cable, both lots of lumber, and the bowling alleys) were the property of the War and Navy Departments, and were shipped for them and at their order. The asphalt was shipped by the Civil Aeronautics Administration, but to complete a project held by the War Department to be not only necessary to national defense and the most important airfield in Alaska but also "vital to the immediate defense of key points" in the territory (R. 34). The Civil Aeronautics Administration was thus undertaking to construct a military airfield on behalf of the Army, and the asphalt being shipped for the runways must be treated exactly as if it were transported by the Army for that purpose.

II

GOVERNMENT PROPERTY BEING SHIPPED FOR USES DIRECTLY RELATED TO COMBAT PREPARATION OR TO ACTUAL COMBAT IS ENTITLED TO MOVE AT LAND-GRANT RATES

An additional ground for supporting the Government's right to transport the five shipments at lower rates is the fact that each moved for a use directly related to preparation for actual combat,

or to combat itself. We need not repeat that, for the reasons stated in our brief in Nos. 56 and 57, we believe that the coverage of the land-grant provision of the Transportation Act is sufficiently broad to include all national defense shipments, and that all narrower interpretations, including that now urged by petitioner, are basically unsound. But even the far more restricted construction of Section 321 (a) suggested in this point requires affirmance of the judgment below.

Traditionally, the clash of armies has been the essential element in war, and the grand aim of warring nations is the defeat of their adversary's armed forces. Combat is quintessentially military, and we would suppose that no one could deny that actual weapons of war, arms, or munitions ultimately intended for use against the enemy's personnel or property constitute military property moving for a military use. Few would cavil at gasoline intended for tanks, lubricating oil for artillery pieces, K-rations for soldiers, or tires for jeeps. But as one moves backward from the actual physical contact of armed forces with the enemy, there will be those who will say that the line between "military" and "non-military" must be sharply drawn at one point or another, and that some fixed mark separates the "military" from the "civil." Petitioner, for instance, insists on placing the boundary line close to the individual soldier and sailor, and classifies only use by him as "mili-

tary." The major difficulty with that view is that Congress established no such specific sign of differentiation in Section 321 (a), either expressly or by implication, and we believe that any hard line of demarcation can be supplied only at the cost of rewriting the statute. In any case, delimitation of the area reserved for reduced land-grant rates, be it sharp or fluid, must take account of Congress' intention in enacting Section 321 (a), the liberality with which the statute must be read, and the words Congress used (see *infra*, pp. 41–46). In the light of these factors, the smallest field in which property may be said to be military and for military use is the area directly related to preparation for combat, or to combat itself. *Cf. Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605, 608 (N. D. Calif.). On this interpretation, determination of individual cases will, of course, require the exercise of practical judgment by the railroads and the Government's accounting officers, and perhaps of the courts, but this is a characteristic common to all legislation framed in general terms involving linked chains of causation or relation. Cf. *Gully* v. *First Nat. Bank*, 299 U. S. 109, 117–118; *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

There can be little doubt that each of the five shipments in this case consisted of property being

transported for a use directly related to combat preparation or to actual combat. In two instances (copper cable, lumber) the shipments were immediately to be used for the production or installation of arms or weapons (degaussing equipment, demountable military bridges), in one (asphalt) for the construction of the essential portion (runway) of a combat installation (airfield), in another (lumber) for the construction of a Government war plant manufacturing a weapon (ammunition), and in the fifth (bowling alleys) to sustain morale of naval personnel stationed at a combat installation and of war workers erecting that airfield under Navy jurisdiction. Fuller discussion will clarify this direct relationship between the five shipments and actual military offense or defense.

1. *Copper cable for degaussing equipment.*—The cable was to be used in the installation, on a Maritime Commission cargo vessel, of degaussing equipment to counteract German magnetic mines (R. 24) which were an important danger to all ships approaching the British Isles. As part of its task of protecting merchant ships, the Navy appears to have considered this equipment as defensively necessary as anti-aircraft batteries or escorts, and accordingly paid for and supervised its acquisition and installation (R. 24–25). Degaussing equipment, in itself, is a defensive weapon of war involving direct contact with the

enemy, like an anti-aircraft gun, and would undoubtedly be entitled to land-grant rates. Cable used in its installation on the ship is hardly less closely related to actual combat. It is an immediate accessory of a weapon, the analogy of gasoline for a bomber, or camouflage paint for a warship. That a Maritime Commission vessel and not a warship carried this degaussing equipment does not, of course, deprive it of its character as a weapon. The purpose was still to foil hostile combat action. Moreover, our merchant marine has a significant place in the defense of the country and the prosecution of war. In the Declaration of Policy of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C., Sec. 1101, the national defense takes priority over the development of commerce; ship designs must be submitted to the Navy Department "in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Goverment in time of war or national emergency," Merchant Marine Act, 1936, Sec. 501 (b), 46 U. S. C. Sec. 1151 (b); and in time of "national emergency" or when the "security of the national defense" makes it advisable, the Maritime Commission is empowered to requisition or purchase merchant marine vessels, Merchant Marine Act, 1936, Sec. 902, 46 U. S. C., Sec. 1242. During the national defense and war periods, the Commission procured

cargo and transport vessels of all kinds, some of which were later turned over to the Army or Navy, and others carried essential war supplies to our allies and our own troops overseas. Its importance as a war procurement agency was so obvious that Congress included it without question in the first Renegotiation Act (Sixth Supplemental National Defense Appropriation Act, April 28, 1942, 56 Stat. 245).

2. *Lumber for Marine Corps military bridges.*—This shipment of fir lumber went to make up an essential implement of combat, i. e., Marine Corps demountable floating bridges required to move military personnel and vehicles across water barriers (R. 29). It is difficult to imagine any property more closely related to arms or weapons than the materials out of which they are made.

3. *Liquid paving asphalt for Cold Bay airport.*—The asphalt was destined to pave the runways of an Alaskan airfield which had officially been designated by the Secretaries of War, the Navy, and Commerce as "necessary for national defense" and by the Army's Alaskan command as the most important field in the territory and "vital to the immediate defense of key points in Alaska" (R. 33-34). The Cold Bay field did actually play an important part in Alaskan defense; the unexpected appearance of bombers based there turned back the Japanese attack on Dutch Harbor. A more direct combat purpose than the de-

velopment of such an essential air base for the Army in the Alaska theatre of operations can hardly be imagined. Without such bases the air force would be immobilized and air defense or attack nullified. Asphalt for the runways of this field is, therefore, directly related to combat.[11]

4. *Lumber for construction of ammunition plant.*—This shipment moved over petitioner's road for construction, under a War Department cost-plus-fixed-fee construction contract, of a Government-owned ordnance plant producing ammunition for the Army (R. 26–27). These plants, which were demanded by the enormously enlarged need for ammunitions and the inability of private concerns to undertake the necessary production, were Government-owned plants operated by War Department cost-plus-fixed-fee contractors who furnished managerial and engineering services, but assumed little or no risk and put up little or no capital. They were at all times closely supervised by the Ordnance Department, and each plant

[11] Possible anticipated civil use of the airfield in the indefinite future would not disentitle the shipment to reduced rates, any more than the possibility of future sale of all military or naval property (including airfields) to civilians or localities under the Surplus Property Act of 1944 would suffice to deprive all such property of the land-grant privilege. At the time of the hearing in the District Court, the field was an Army installation known as Fort Randall, under the War Department's control (R. 34), and we are not aware of any change in its status.

was an Army installation as well as a factory.[12]

Concededly, ammunition, which is an essential combat weapon, would move at land-grant rates. As we have urged above with regard to lumber for military bridges, materials moving for manufacture of the shells would certainly be held to be directly related to preparation for combat. Materials for construction of a Government-owned, War Department sponsored, ammunition plant are hardly less immediately related. The line of connection between the shipment of lumber and the resulting ammunition is direct and easily visible; the intervening "steps" are few; the indispensability of the shipment to the production of the shells is clear; no other goods were to be produced at the Plant and it was erected in direct response to increased war demands for ammunition.

5. *Bowling alleys.*—This equipment was originally intended to serve a dual purpose, first as a

[12] Construction and operation of Government-owned arsenals and other ordnance plants has long been a recognized military function of the Government. Article I, Section 8, Clause 17 of the Constitution authorizes Congress to exercise exclusive jurisdiction of land acquired for "Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings." Hamilton recommended Government manufacture of all necessary weapons of war in his famous Report of Manufactures. See Earle, *Makers of Modern Strategy* (1943) 132. The system of Government armories and arsenals was early developed in the first years after the adoption of the Constitution. Title 50 of the United States Code, entitled "War," has an entire chapter dealing with "Arsenals, Armories, Arms, and War Material Generally."

means of recreation for employees of the contractor constructing the naval air base at Dutch Harbor, and later as recreation facilities for military and naval personnel occupying the station (R. 31). Actually, all civilian workmen were evacuated before the completion of the building housing the alleys and the facilities were never used by civilians (R. 31).

Thus, the record is clear that the bowling alleys were initially intended for direct use by military and naval personnel, and actually used exclusively by such persons; under petitioner's own theory, they are therefore clearly entitled to land-grant rates. Articles of recreation are, of course, of prime importance in sustaining the morale of soldiers or sailors, especially those stationed at remote posts subject to possible intermittent attacks.[12] Dutch Harbor was such a base, in the active Alaskan theatre of operations, engaged in the servicing of combat planes defending the Aleutians. It is hardly necessary to demonstrate the close and direct relationship of such athletic equipment as bowling alleys to the maintenance of the morale and physical condition of combat forces. Cf. *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 485. Use of the alleys by civilian workers prior to their use by military

[12] Competent military authorities having made this determination, it is not open to attack by petitioner or to review here. Cf. *United States* v. *Bush & Co.*, 310 U. S. 371, 380.

personnel does not detract from this significant military use. Such off-time facilities were essential for military personnel. The adoption of an economy measure eliminating the expenditure of additional funds to provide duplicate recreational facilities (R. 31) should not clothe this shipment with a "civilian" character depriving it of reduced rates.

In our view, use of the bowling alley equipment by the civilian construction workers at Dutch Harbor is also sufficient. Dutch Harbor was an important naval base in Alaska. The work of the construction employees was considered essential by the Navy Department. Remoteness of the station, rough weather, difficult working conditions, and boredom in off-hours created an extraordinary morale problem necessitating special measures to keep the workers satisfied, on the job, and willing to work. The recreation hall and theatre at Dutch Harbor were thus projected and constructed for the primary purpose of expediting completion of the military and naval installations (R. 31).[14]

We recognize that use of the equipment by civilian workers constructing a naval base is the

[14] In the analogous case of the Alaskan Highway, the Committee on Roads of the House of Representatives agreed that no "criticism should accrue to those in charge for providing some form of recreation of this type [moving-picture projection facilities] for these workers in their spare time." H. Rep. No. 1705, 79th Cong., 2d Sess., pp. 53–54.

farthest removed of the five instant shipments from combat use, but in the circumstances we believe that the connection is sufficiently close to warrant land-grant coverage, even on the narrow theory here suggested. Alaska was a theatre of operations and the airfield was certain to be a combat field. Civilians working on such a project have a different status from those working in the United States in war plants, and it is justifiable to treat them as closer to the actual waging of hostilities.[15]

Petitioner's argument that only finished articles are eligible fo rland-grant rates we have already answered in large part. There is no historical justification for segregating finished products

[15] Unlike the Articles of War (Art. 2d, 10 U. S. C. 1473 (d)), before 1943 the Articles for the Government of the Navy (34 U. S. C. 1200 *et seq.*) did not extend to persons accompanying or serving with the Navy. The Act of March 22, 1943, c. 18, 57 Stat. 41, 34 U. S. C. Supp. V, 1201, provided for the extension of the Articles "in time of war or national emergency" to "all persons, other than persons in the military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects * * * *Provided*, That the jurisdiction herein conferred shall not extend to Alaska * * *, except * * * that part of the Aleutian Islands west of longitude one hundred and seventy-two degrees west." Dutch Harbor is approximately 167° west. Therefore, even if the 1943 amendment had been in effect in 1942, these civilian workers would not have been subject to naval court-martial jurisdiction.

from processed parts and raw materials, and attributing military character only to the former. There is likewise no word in Section 321 (a) indicating any difference in treatment on the basis of state of manufacture alone."[16] Nor is there any functional reason for the separation. If the test is directness of relationship to combat, and it be admitted that more than arms or munitions are covered by the land-grant proviso to Section 321 (a) (*supra*, pp. 23–25), then it follows that many raw materials and parts are as closely connected to hostilities as finished products, and are therefore equally entitled to reduce rate transportation. Petitioner itself would probably not deny coverage to such materials as lumber used to repair a combat bridge across the Rhine, wire for communication repair work in a zone of operations, concrete materials for European airfields, or jeep parts. Moreover, there is often no proper test for determining when a raw material turns into a finished product; the course of processing, packaging, and use may frequently be integral, without significant break. Cf. *Southern Pacific*

[16] Criminal Code, Section 35 (C), 18 U. S. C. 82 forbidding purloining, stealing, or injuring any "*property* of the United States" or "any *property* which has been or is being made, manufactured, or constructed under contract for the War or Navy Departments of the United States" has been expressly held to include not only finished products but also raw and processed materials available for the construction of the finished product. *United States* v. *Anderson*, 45 F. Supp. 943 (S. D. Calif.).

Co. v. *Defense Supplies Corp.*, 64 F. Supp. 605, 608 (N. D. Calif.).

Similar reasons, already discussed in part, *supra*, pp. 21–23, urge rejection of the contention that civilian handling of the goods *ipso facto* divests them of any direct relationship to combat. The closeness of this connection depends on many factors, sometimes including the military status of the persons next concerned with the goods, but mainly stemming from the destined use of the property and the proximity to actual conflict. Under the interpretation of Section 321 (a) adopted in this point of our brief, the important element is the sequence of operations or stages leading to combat, and the status of those carrying on these operations is generally immaterial. Civilian and military personnel are frequently used interchangeably, as the record in the instant case demonstrates. Construction work at Dutch Harbor was commenced by civilian workers and carried on after December 1942 by Seabees, members of the Navy's Construction Battalion (R. 31). Likewise, work at the field at Cold Bay began with civilians and was continued by the War Department with troop labor (R. 34). It is well known that civilian engineers, construction men, technicians, and psychological warfare workers accompanied the Army and the Navy in theatres of operation, and often were subject to military or naval court-martial jurisdiction. Articles of War,

Art. 2d, 10 U. S. C. 1473 (d); Articles for the Government of the Navy, 34 U. S. C., Supp. V, 1201; cf. *Perlstein* v. *United States*, 151 F. 2d 167 (C. C. A. 3), certiorari granted April 22, 1946, Oct. Term 1945, No. 629, dismissed as moot June 10, 1946; *In re Di Bartolo*, 50 F. Supp. 929 (S. D. N. Y.).

It is clear, therefore, that each of the five disputed shipments was directly related to actual combat, or to preparation for combat. It follows that each item of property consisted of "military or naval property of the United States moving for military or naval and not for civil use," and therefore was entitled to reduced land-grant rates.

III

SECTION 321 (A) OF THE TRANSPORTATION ACT OF 1940 MUST BE LIBERALLY CONSTRUCTED TO INCLUDE GOVERNMENT PROPERTY MOVING FOR THE MILITARY PURPOSE OF PROMOTING THE NATIONAL DEFENSE OR THE PROSECUTION OF THE WAR

In the brief in Nos. 56 and 57, we have set forth at some length (pp. 57–79) the Congressional history of Section 321 (a) and of Public Law No. 256, 79th Congress, the Act of December 12, 1945, *infra*, pp. 50–51, prospectively abolishing all land-grant rates. This history shows that Congress sought to relieve the railroads of their recently increased burden of transporting relief and emergency shipments, without interfering with the carriage of

defense materials.' In this way, the Government and the railroads would return to the original purpose of the land-grants to facilitate the national defense."[17] This Congressional aim supports a liberal construction of the land-grant provisions of Section 321 (a) to cover all government property moving in support of the national defense. The statute cannot properly be interpreted if one starts with the premise that Congress intended to limit its continuation of land-grant rates within the narrowest possible compass. Rather, the basic purpose of Congress was to cut off special rates for dominantly nondefense activities, such as those carried on by the P. W. A. and W. P. A., without impairing the defense effort which even in 1940 had become of primary importance. It is this purpose which provides the context in which the words of the act must be read."[18]

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[17] This purpose is expressly emphasized in petitioner's own land-grant act. Section 20 of the Act of July 2, 1864, 13 Stat. 365, 372, listed as one of its objects "to secure the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes * * *." See footnote 2, *supra*, p. 4.

[18] In the instant case, since petitioner insists that Section 321 (a) continues land-grant rates only for articles shipped to or for use by military or naval personnel, it may be pertinent to note that in the 77th Congress, H. R. 5598, a bill proposing to restrict the deduction authorized by Section 321 (a) to the transportation of "munitions and implements of war and property necessary for the maintenance and subsistence of the armed forces of the United States," was never even acted upon by Committee or House.

Added to the force of the legislative background of Section 321 (a) is the "familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual." *Slidell* v. *Grandjean*, 111 U. S. 412, 437; see also *Southern Pacific Co.* v. *United States*, 307 U. S. 393, 401; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 272; *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 76. This rule applied with full effect to the original all-embracing reduced rate conditions of the grant, as embodied in the Act of June 7, 1924 (*Southern Pacific Co.* v. *United States, supra; Southern Ry. Co.* v. *United States, supra*), but petitioner here, as do respondents in Nos. 56 and 57, seem to claim that the Government's partial release of its public right somehow turns the scales wholly in the railroad's favor. Petitioner appears to make a double argument: first, that Section 321 (a) constitutes "remedial" legislation and "exception" from its scope must be strictly construed, and, secondly, that the release filed under Section 321 (b) constituted full "consideration" for the Government's rate concession and resulted in a contract which should

not be interpreted favorably to the Government. Both arguments are erroneous.

1. The first would pervert the doctrine that broad regulatory measures correcting a previous mischief are "remedial," and exceptions from the sweep of the regulatory power should therefore be narrowly limited. Obviously, this rule has not the slightest application to a nonregulatory statutory "exception" retaining for the Government an important economic privilege of great value. Nor should Section 321, which was tacked onto an omnibus transportation measure mainly overhauling the Interstate Commerce Act, be construed as *pari materia* with the regulatory sections of the Act. Cf. *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321, 330 (C. C. A. 8), certiorari denied, 209 U. S. 544. Section 321 cannot, in itself, be read as solely concerned with relief of the railroads. The policy of the provision flows as much from the "exception" as from the body of the section. The desire of Congress was to continue land-grant rates for national defense, but not for other governmental purposes. As is suggested by the legislative history summarized in our brief in Nos. 56 and 57, pp. 57–75, it may well have been an accident of draftsmanship and of the legislative course of the statute that Section 321 cast its provision concerning "military or naval property" in the form of an exception rather than as main text.

2. Petitioner's second argument stresses Section 321 (b), requiring a release of all claims to unpatented lands as a condition precedent to the effectiveness of Section 321 (a).[19] The legislative history indicates that Subsection (b) was inserted, over the protests of the railroads, at the urging of various Government agencies, particularly the Department of the Interior, which wholly opposed repeal of the land-grant statutes but felt that, at the very least, the roads should at last put an end to their unresolved public land claims. Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1915, S. 1990, and S. 2294, pp. 5, 57–63, 64–65, 97, 164–165. At no point was this action by the carriers ever regarded, by them

[19] Petitioner claims that it made a considerable sacrifice in giving its release under Section 321 (b), but it is to be noted that the amount to which it would ultimately be entitled, after trial of the issues remanded by this Court in *United States* v. *Northern Pacific Railway Company*, 311 U. S. 317, was undetermined and might have been reduced to a pittance. Indeed, if the Government had prevailed on all remaining issues, the railroad's recovery might have been entirely nullified and the Government might have secured judgment in its own favor. Moreover, this Court, being equally divided, reserved certain points (311 U. S. at 342) which, if they had been decided for the Government, would have entirely destroyed petitioner's claim; on a second appeal these issues, being reserved, would have been open for decision against petitioner. It should also be noted that figures cited by petitioner for value of the lands, and set forth in the record at R. 23, are petitioner's own valuations.

or anyone else, as a "consideration" or *quid pro quo* for abolition, whole or partial, of land-grant rates. Rather, the releases were "given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act of 1940." *Santa Fe Pacific R. Co.* v. *Ickes,* 57 F. Supp. 984, 987 (D. D. C.), reversed on other grounds, 153 F. 2d 305 (App. D. C.), pending on certiorari, Nos. 97 and 98, this Term. Moreover, regardless of the existence of adequate "consideration" and a binding contract, petitioner's argument runs counter to the judicial history of land-grant rates. The railroads' original obligation to haul government property at reduced charges was "consideration," in exactly the same sense, for the initial nineteenth century land-grants, and the same kind of contract between the Government and the railroads resulted (*Burke* v. *Southern Pacific Railroad Company,* 234 U. S. 669, 679; *Louisville & Nashville Railroad Company* v. *United States,* 267 U. S. 395, 402), but the Court has not hesitated to apply the general rule favoring the Government. See cases cited *supra,* p. 43. Section 321 (a) stands on no higher footing.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

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APPENDIX

The Transportation Act of September 18, 1940 54 Stat. 898, 49 U. S. C. 65 (a), *et seq.*, provides, in part, as follows:

PART II—RATES ON GOVERNMENT TRAFFIC

Government to Pay Full Rates

SEC. 321 (a). Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such trans-

portation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Deduction of Overpayments

SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills there-

for, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The Act of December 12, 1945, c. 573, 59 Stat. 606, provides:

> * * * That subsection (a) of section 321 of title III, part II, of the Transportation Act of 1940, be, and the same is hereby, amended by striking out the following: "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;" so that said subsection, as so amended, shall read as follows:
>
> "SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of section 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States

mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

SEC. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided, however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare or charge in effect at the time of entering into such contract of carriage or shipment.

SEC. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

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SUPREME COURT OF THE UNITED STATES

No. 400.—October Term, 1946.

Northern Pacific Railway Company, Petitioner, v. The United States of America. } On Writ of Certiorari to The United States Circuit Court of Appeals for the Seventh Circuit.

[March 3, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to No. 56, *United States* v. *Powell*, and No. 57, *United States* v. *Atlantic Coast Line R. Co.*, decided this day. This case, like those, involves the construction of the provision of § 321 (a) of the Transportation Act of 1940 which entitles "military or naval property of the United States moving for military or naval and not for civil use" to land-grant rates. Petitioner was a land-grant road, 13 Stat. 365, 370, and for years carried government property at land-grant rates. 43 Stat. 477, 486, 10 U. S. C. § 1375. It qualified to receive the higher rates authorized by § 321 (a) of the Transportation Act of 1940 by the timely filing of the required release of land-grant claims pursuant to § 321 (b) of the Act.[1]

The shipments in controversy were made over petitioner's railroad on government bills of lading in 1941, 1942, and 1943. They were admittedly government property at the time of carriage. Petitioner submitted its bills to the Government at the published commercial tariff rates. The United States, claiming that

[1] This release was followed by a settlement of the litigation before this Court in *United States* v. *Northern Pacific R. Co.*, 311 U. S. 317. See *United States* v. *Northern Pacific R. Co.*, 41 F. Supp. 273; S. Doc. No. 48, 77th Cong., 1st Sess.

under § 321 (a) of the Transportation Act each shipment was entitled to move at land-grant rates, deducted the difference between the commercial rates and the land-grant rates. Petitioner thereupon brought this suit under the Tucker Act to recover the deducted sums. The District Court entered judgment for the United States on the claims here involved. 64 F. Supp. 1. The Circuit Court of Appeals affirmed. 156 F. 2d 346. The case is here on certiorari.

The shipments involved five types of property:

Copper cable.—Copper cable was transported to Tacoma, Wash., for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel being so built that it might readily be converted into a military or naval auxiliary. The work was done by a contractor under contract with the Maritime Commission. The degaussing specifications were furnished by the Navy which also furnished the equipment and bore the cost. The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Whether it operated as a cargo vessel or as a military or naval auxiliary does not appear.

Lumber for construction of munitions plant.—In 1942 the Twin Cities Ordnance Plant was being constructed in Minnesota by contractors under the supervision of the Army. The plant was government owned and Army sponsored. Army officers were procuring agents for the lumber used in the construction. Petitioner transported lumber for use in the construction. The plant was completed in 1943 and manufactured ammunition for the armed forces.

Lumber for construction of Marine Corps pontons.—Petitioner in 1943 carried fir lumber to a plant in Minnesota to be treated, kiln dried, milled, and manufactured by a contractor into parts of demountable floating bridges required to move military personnel and war vehicles

across water barriers. The construction was under a contract with the Marine Corps. The manufactured product was either shipped overseas in connection with military or naval operations or was used in connection with the training of combat engineers.

Bowling alleys for Dutch Harbor.—Petitioner moved bowling alley equipment to Seattle, Washington, for reshipment to the Naval Air Base, Dutch Harbor, Alaska. The Navy had entered into a contract for the construction of an air base at Dutch Harbor on public land reserved for Navy use. The purchase and installation of the bowling alleys were pursuant to that contract and were approved by the Navy officer who had supervision and control of the construction program. The recreational facilities, which included the bowling alleys, were planned for initial use by the civilian construction crew and then, when construction work was ended, by the Navy. But in fact they were used only by members of the armed forces.

Liquid paving asphalt for Cold Bay, Alaska, airport.—In 1942 petitioner moved liquid paving asphalt to Seattle, Washington, for reshipment to Alaska. The asphalt was for use in constructing runways at an airport at Cold Bay under a program of the Civil Aeronautics Authority approved by a joint cabinet board as being necessary for the national defense. Work was commenced by a civilian contractor and, after the shipment had moved, was taken over by the Army which thereafter had full control of the field.

In four of the above instances the property was consigned to an army or navy officer; in the fifth, the shipment of liquid paving asphalt, the Civil Aeronautics Authority was the consignee. And as we have said, the property in each case was at the time of shipment property of the United States. The question remains whether within the meaning of § 321 (a) it was "military or naval" property and, if so, whether it was "moving for military or naval" use.

There is a suggestion that since the shipment of asphalt was to a civilian agency, the Civil Aeronautics Authority, it was not "military or naval" property. The theory is that "military or naval" property means only property shipped by or under control of the army or navy.

We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments. Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example. See Merchant Marine Act of 1936, § 902, 49 Stat. 2015–2016, as amended, 46 U. S. C. § 1242. And shortly before the Transportation Act of 1940 was enacted, Congress by the Act of June 25, 1940, 54 Stat. 572, 573–574, authorized the Reconstruction Finance Corporation to create subsidiary corporations to purchase and produce equipment, supplies, and machinery for the manufacture of arms, ammunition, and implements of war. And later that Act was amended to enable those corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, 55 Stat. 248, 249. As we have held in *United States* v. *Powell*, *supra*, not every purchase which furthers the national defense is for "military or naval" use within the meaning of § 321 (a). But property may fall within that category though it is procured by departments other than War or Navy.

It is also suggested that the property covered by the exception in § 321 (a) is confined to property for ultimate use directly by the armed forces. Under that view materails shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We

likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function.

But petitioner contends that, even if that is true, the construction of vessels or other military equipment or supplies is in a different category. It argues that none of the articles shipped in the present case was military or naval, since they were not furnished to the armed forces for their use. They were supplied, so the argument runs, for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use.

Military or naval property may move for civil use, as where army or navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in

their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under § 321 (a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605. Within the meaning of § 321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling.

Measured by that test, there can be no doubt that the five types of property involved in the present litigation were "military or naval" property of the United States "moving for military or naval and not for civil use" within the meaning of § 321 (a). The lumber for the pontons, the asphalt for the airfield, the lumber for the ammunition plant were used in Army or Navy projects directly related to combat preparation or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of "military or naval" property. It, too, was a defensive weapon. Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilian workers makes no difference. It is the nature of the work being done, not the status of the person handling

the materials, that is decisive. Supplies to maintain civilians repairing army or navy planes is a case in point. The dominant purpose of the project in this case was the same whether civilians or military or navy personnel did the actual work.

Petitioner contends that if Congress intended to include in "military or naval property" articles for use in the manufacture of implements of war, it would have said so. It seeks support for that position from other Congressional enactments under which such materials were excluded because not mentioned [2] or were included by specific reference.[3] We can find, however, little support for petitioner's contention in that argument. Apart from the different wording of those acts and the different ends they served, there is one decisive and controlling circumstance. We have more in § 321 (a) than a declaration that "military or naval" property is entitled to land-grant rates. Congress went further and drew the line between property

[2] The embargo against "arms or munitions of war" authorized by the Joint Resolution of March 14, 1912 (see 37 Stat. 1733), was held not to include machinery for the construction of a munitions plant. 32 Op. Atty. Gen. 132.

[3] Thus the Act of July 2, 1940, 54 Stat. 712, 714, 50 U. S. C. App. § 701, authorized the President to prohibit or curtail "the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof . . ."

The Act of November 30, 1940, 54 Stat. 1220, amending the Anti-Sabotage Act, defined "national-defense material" as including "arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof," which the United States intended to use in the national defense.

The Act of October 16, 1941, 55 Stat. 742, authorized the President to requisition the following types of property for the defense of the United States: "military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions . . ."

moving for "military or naval" use and property moving for "civil" use. As we have said, the controlling test is the use to which the property is dedicated or devoted. The fact that Congress did not define what was a "military or naval" use as distinguished from a "civil" use is unimportant. The classification made by Congress under this Act, unlike that made under the acts on which petitioner relies, was all inclusive not partial. What is military or naval is contrasted to what is civil. The normal connotation of one serves to delimit or expand the other. It is in that context that "military or naval" must be construed.

Petitioner also contends that § 321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311–312. But it is a familiar rule that where there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grandjean*, 111 U. S. 412, 437. See *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co.* v. *United States*, 307 U. S. 393, 401; *Southern Ry. Co.* v. *United States*, *supra*. That principle is applicable here where the Congress, by writing into § 321 (a) an exception, retained for the United States an economic privilege of great value. The fact that the railroads, including petitioner, filed releases of their land-grant claims in order to obtain the benefits of § 321 (a) is now relied upon as constituting full consideration for the rate concession. It is accordingly argued that the railroads made a contract with the United States which should be generously construed. Cf. *Russell* v. *Sebastian*, 233 U. S. 195, 205.

The original land-grant resulted in a contract. *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 680. Yet, as we have seen, they were nonetheless public grants strictly construed against the grantee. The present Act, though passed in the interests of the railroads, was in essence merely a continuation of land-grant rates in a narrower category. Therefore, it, too, must be construed like any other public grant.

Affirmed.